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The End of an Era: A Review of the Changing Law of Spousal Burglary

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INTRODUCTION

On June 1, 1999, James C. Jones, Jr. forced his way into the home that he and his estranged wife, Margaret "Maggie" Jones, formerly shared and brutally stabbed her more than twenty times with a kitchen knife that he had brought with him.[1] The couple's ten-year-old daughter, Stephanie, and seven-year-old son, Brandon, tried in vain to stop him.[2] He then dragged his wife by her hair to the door leading to the basement, threw her down the steps and continued to stab her until she died from multiple massive wounds.[3] When the police arrived in response to a frantic 911 call placed by Stephanie, they found the little girl at the bottom of the basement stairs futilely trying to revive her mother by providing mouth-to-mouth resuscitation.[4] After he murdered his wife, James Jones fled the house through an upstairs window, but he was apprehended shortly thereafter by police officers.[5] He was subsequently charged with two counts of aggravated murder with specification in violation of Section 2903.01(B) of the Ohio Revised Code,[6] one count of aggravated burglary in violation of Section 2911.11(A)(2) of the Ohio Revised Code,[7] and one count of

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1. Mark Law, *Jury Spares Life in Mingo Murder*, HERALD-STAR, March 22, 2000, at 1A.
2. Law, *supra* note 1.
3. Law, *supra* note 1.
4. Prosecution's Opening Statement, State v. Jones, No. 99-CR-120 (final transcript of proceedings not available at the time of publication).
5. *Id.*
6. Ohio Revised Code Section 2903.01 (B) is found in Title XXIX, Crimes — Procedure, Chapter 2903, Homicide and Assault and reads: "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape." OHIO REV. CODE ANN. § 2903.01(B) (Anderson 2000).
7. Ohio Revised Code Section 2911.11(A)(2) is found in Title XXIX, Crimes — Procedure, Chapter 2911, Robbery, Burglary, Trespass and Safecracking and reads:

> structure or in a separately secured structure or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

violation of a protection order or consent agreement under Section 2919.27(A)(1) of the Ohio Revised Code.[8]

The Jones's marriage had been fraught with domestic violence that eventually led Maggie Jones to seek assistance from a local women's shelter and to seek help from the courts in the form of a civil protection order to prohibit her husband from returning to the home or from harassing her in any manner.[9] She eventually filed for divorce.[10] Subsequently, James Jones moved out of the house and began living with his parents; Maggie remained in the marital home with the couple's two children.[11] The couple was legally married at the time of the murder, and title to the marital home resided jointly in James and Maggie Jones.[12]

The prosecutor sought the death penalty for James Jones for the murder of his wife and the aggravating circumstances that included

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(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

OHIO REV. CODE ANN. § 2911.11(A)(2) (Anderson 2000).

8. Criminal Appearance and Execution Docket, State v. Jones, No. 99-CR-120 (unreported case from the Common Pleas Court of Jefferson County, Ohio). Ohio Revised Code Section 2919.27(A)(1) is found in Title XXIX, Crimes — Procedure, Chapter 2919, Offenses Against the Family and reads: "No person shall recklessly violate the terms of any of the following: (1) A protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code . . . ." OHIO REV. CODE ANN. § 2919.27(A)(1) (Anderson 2000).

9. Memorandum Contra to Defendant's Motion to Dismiss at 3, *Jones* (No. 99-CR-120). The civil protection order engendered considerable debate during the pre-trial hearings. James Jones claimed he was unaware the order was still in effect. The prosecutor argued that Jones acknowledged during an earlier hearing that he understood the order to still be in effect and that, as a result, Section 3103.04 of the Ohio Revised Code [prohibiting one spouse from excluding the other from his/her dwelling house in absence of a court order] did not preclude a charge of aggravated burglary. Although the court ultimately ruled that the civil protection order was in effect at the time of the murder and that the aggravated burglary charge could stand, the trial judge expressed his concern regarding the disparity between a plain reading of Section 3103.04 and the Ohio Supreme Court rulings discussed *infra*. Order Overruling Defendant's Motion to Dismiss, *Jones* (No. 99-CR-120). The trial judge remarked:

> The State makes additional arguments that are not necessarily convincing to this Court but are nonetheless rendered moot by this Court's findings with respect to the CPO. For example, the State cites *State v. Lilly* (citation omitted) and *State v. O'Neal* (citation omitted) for the proposition that a spouse may lose all rights of joint possession under a joint deed and his right of entry under R.C. 3103.04 simply by being absent while the other party is not absent . . . . [This contention is] rendered moot by the Court's finding with respect to the CPO and this Court expressly leaves [that issue] undecided.

Order Overruling Defendant's Motion to Dismiss at 5, *Jones* (No. 99-CR-120).

10. Law, *supra* note 1.

11. Transcript of Proceedings for February 11, 2000, at 66-67, *Jones* (No. 99-CR-120).

12. *Id.* at 22.

aggravated burglary and prior calculation and design.[13] On March 8, 2000, a jury convicted Jones of aggravated murder with specifications that he attempted to commit aggravated burglary, was the principal offender in the attempt, and that the murder was committed with prior calculation and design.[14] The jury sentenced James Jones to life in prison without the possibility of parole.[15] Oddly enough, it is the aggravated burglary charge that sparked the writing of this article.[16]

Since 1919,[17] Ohio Revised Code Section 3103.04 ("Section 3103.04") has provided that "neither [husband nor wife] can be excluded from the other's dwelling, except upon a decree or order of injunction, made by a court of competent jurisdiction."[18] Several Ohio courts have interpreted the statute to mean that it is legally impossible for one spouse to be convicted of criminal trespass and/or burglary of the other spouse's residence.[19] However, perhaps in response to the growing public concern about domestic violence such as that in the *Jones* case described at the outset of this article, two recent Ohio Supreme Court decisions, *State v. Lilly* and *State v. O'Neal*, have reversed this line of thinking by holding that Section 3103.04 is inapplicable in criminal cases.[20] These cases significantly alter Ohio precedent with respect to criminal, domestic relations, and property law.

Section I of this comment will review the history of Ohio Revised Code Section 3103.04; Section II will address the role of the

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13. Criminal Appearance and Execution Docket at 1, *Jones* (No. 99-CR-120).

14. *Id.* at 19.

15. *Id.* at 21.

16. The writer was granted permission by the trial judge to attend the pre-trial hearing at which the aggravated burglary charge was addressed. Extensive discussions with the trial judge, and to a lesser extent, with both the prosecuting and defense attorneys, followed and an engaging debate emerged about the state of the law as it pertained to spousal burglary. The idea for this comment emerged from those sessions. The writer wishes to sincerely thank the Honorable Judge Joseph J. Bruzzese, Jr., for his unfailing support and assistance with this comment. Additional thanks are due to Assistant Prosecutor, Costa D. Mastros, and defense attorney, Samuel A. Pate, for offering copies of their memoranda and insight into their positions on the issue.

17. When the legislature originally enacted Section 3103.04 in 1887, it contained a blanket prohibition against the exclusion of one spouse from the dwelling of the other spouse. In 1919, an amendment was added to permit exclusion of a spouse from the other's dwelling if a court of competent jurisdiction issued an order directing the same. *See* Slansky v. Slansky, 293 N.E.2d 302, 307 (Ohio Ct. App. 1973).

18. OHIO REV. CODE ANN. § 3103.04 (Anderson 2000).

19. *See, e.g.*, State v. Middleton, 619 N.E.2d 1113 (Ohio Ct. App. 1993) and State v. Herder, 415 N.E.2d 1000 (Ohio Ct. App. 1979).

20. State v. Lilly, 717 N.E.2d 322 (Ohio 1999) and Ohio v. O'Neal, 721 N.E.2d 73 (Ohio 2000).

common law in making it legally impossible for a spouse to be charged with the burglary of the other spouse's dwelling; and Section III will discuss the change in the law that has resulted from the dramatic increase in spousal violence. Section IV will analyze the two recent Ohio Supreme Court cases that address spousal burglary; Section V will undertake an exhaustive review of the manner in which other states have treated the issue; and Section VI will suggest a statutory amendment to Ohio Revised Code Section 3103.04.

I. OHIO REVISED CODE SECTION 3103.04 INTEREST IN THE PROPERTY OF THE OTHER.

Section 3103.04 is titled "Interest in the property of the other." The full text of this section of the statute reads:

> Neither husband nor wife has any interest in the property of the other, except as mentioned in section 3103.03 of the Revised Code, the right to dower, and the right to remain in the mansion house after the death of either. Neither can be excluded from the other's dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction.[21]

The statute was enacted in 1887 as part of Ohio's Married Women's Act.[22] The Court of Appeals for the Eighth Appellate District, in *Slansky v. Slansky*,[23] described the Act as follows:

> As the Nineteenth Century precursor of today's women's liberation movement, this Act was part of a national campaign to sweep away the common law web of limitations and disabilities which had entangled a married woman's rights to own and dispose of property, to make binding contracts, and to sue and be sued in an individual capacity.[24]

Married Women's Acts were enacted in every state to remove the

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21. OHIO REV. CODE ANN. § 3103.04 (Anderson 2000).

22. Slansky v. Slansky, 293 N.E.2d 302, 304 (Ohio Ct. App. 1973).

23. *Slansky*, 293 N.E.2d at 304. In this case, a wife brought an action in forcible entry and detainer to expel her husband from a home they once shared and to which she held legal title. The parties were separated for four years and the husband remained in the marital home until the time of the action. The court ruled that although "municipal courts have to determine cases in forcible detainer, they are without jurisdiction to determine domestic relations cases and may not determine that one or the other [spouse] may be excluded from the marital home pursuant to [Ohio Revised Code] § 3103.04." *Id.* at 310.

24. *Id.* at 304.

common law barriers that essentially gave all of a woman's rights and interests to her husband upon marriage.[25] However, Ohio's legislature added a limitation to its Act that no other state did at the time; it specifically limited the statute by attaching a proviso prohibiting either spouse from excluding the other from his/her dwelling.[26] According to the *Slansky* court, the model for this "no ousting" provision originated in a proposed civil code for New York.[27] Although the New York Legislature failed to enact the

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25. The following excerpt describes the effect of such acts:

> The effect of the Married Women's Property Acts was to abrogate the husband's common law dominance over the marital estate and to place the wife on a level of equality with him as regards the exercise of ownership over the whole estate. The tenancy was and still is predicated upon the legal unity of the husband and wife, but the Acts converted it into a unity of equals and not of unequals as at common law . . . . No longer could the husband convey, lease, mortgage or otherwise encumber the property without her consent. The Acts confirmed her right to the use and enjoyment of the whole estate, and all the privileges that ownership of property confers, including the right to convey the property in its entirety, jointly with her husband, during the marriage relation.

Sawada v. Endo, 561 P.2d 1291 (Haw. 1977), *reprinted in* Jesse Dukeminier and James E. Krier, Property 366 (4th ed. 1998).

26. Although the addition of a "no ousting" clause was unique to Ohio's statute, it has not been and in some cases is still not, unusual for courts to rule that Married Women's Acts do not enable a woman to bring suit against her husband for a variety of torts and crimes. For example, in *Snyder v. People*, 26 Mich. 106 (Mich. 1872), the Supreme Court of Michigan held that the statutory rights afforded to women under such acts do not supersede common law notions of marital unity. Under such a theory, the court ruled that a husband could not be convicted of arson for burning his wife's home. Justice Cooley noted:

> As regards her individual property, the law has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies, and the unity of man and woman in the marriage relation is no more broken up by giving her a statutory ownership and control of property, than it would have been before the statute, by such family settlement as should give her the like ownership and control. At the common law, the power of independent action and judgment was in the husband alone; now it is in her also, for many purposes; but the authority in her to own and convey property, and to sue and be sued, is no more inconsistent with the marital unity, than the corresponding authority in him.

Snyder, 26 Mich. at 109.

Likewise, the Supreme Court of Ohio decided in 1912 that the Ohio Married Women's Act did not change the common law that "neither a husband nor wife could be prosecuted for larceny of the goods of the other." State v. Phillips, 97 N.E. 976 (Ohio 1912). The Ohio court relied on the decision of the Supreme Court of the United States in *Thompson v. Thompson*, 218 U.S. 611 (1910), in which the Court ruled that the Married Women's Act of the District of Columbia did not abrogate the common law rule that prevented a woman from recovering damages from her husband for assault and battery on her person. *Phillips*, 97 N.E. at 977.

27. *Slansky*, 293 N.E.2d at 305. The proposed code stated that "neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling." *Id.* (quoting Field's Draft, N.Y. Civil Code Section 78 (1865)).

proposed code,[28] the *Slansky* court theorized that it was possible that the Ohio legislature was persuaded that a prohibition against spousal exclusion was necessary in light of two New York cases wherein wives were permitted to eject their husbands from the marital home on the basis that the home was owned by the wife alone.[29] The court commented unfavorably on the potential for Married Women's Acts to undermine marital relations and family harmony by noting:

> [I]t may be argued that a price was paid for vindicating the wife's legal interest in the marital dwelling. For the family home represents more than a bundle of property rights and privileges which the owner is entitled to assert against the rest of the world. Beyond its more primitive function of sheltering the husband and wife from the physical elements, it ideally provides the requisite sanctuary in which a marriage relationship can take root and grow. It has been said that in marriage a husband and wife acquire a personal as well as a legal right to each other's conjugal society. The marital home offers a place wherein spouses may enjoy each other's society as they meet their obligations of mutual respect, fidelity and support. Where a spouse is denied access to the matrimonial home, as was the result in the [New York] cases . . . , these rights and obligations are invariably disturbed.[30]

As the next section will illustrate, many Ohio courts adopted the rationale offered in *Slansky*, which was a civil case, when deciding criminal matters involving a spouse charged with burglarizing the marital home or the other spouse's residence. This is, in many respects, illogical. If one spouse is charged with criminal trespass or burglary, it is unlikely – particularly in light of the fact that many of these charges are coupled with violent acts of assault, rape and murder – that the "requisite sanctuary" referred to by the *Slansky* court exists. Consequently, a court should dismiss any reluctance to intrude on familial harmony.[31]

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28. *Id.* The provision was, however, adopted by California in 1872 as part of its Civil Code. *Id.*

29. *Id.* at 306.

30. *Id* (citations and footnotes omitted).

31. Yet, American case law is replete with this notion of keeping the state out of private family matters. See, for example, *Phillips*, 97 N.E. at 977, wherein the court upheld the common law doctrine prohibiting one spouse from being charged with larceny of the other spouse's goods. Justice Davis, writing for the majority, remarked:

Moreover, the unity of husband and wife, as recognized in the common law, is

II. The Legal Impossibility of Spousal Criminal Trespass and/or Burglary

A review of Ohio decisions surrounding the interpretation of Section 3103.04 reveals only one certainty - the law is not clear. The failure of the legislature to delineate whether the statute applies to both civil and criminal matters has made the courts uncertain regarding how to handle disputes ranging from simple trespass to brutal murders. Lacking sufficient guidance from the statute, judges have been tailoring the law to suit individual facts. This ad hoc tailoring has resulted in significant differences in the rulings.

For some time, Ohio courts seemed content to take the statute at its words; that is to say that because Section 3103.04 states that neither spouse could exclude the other from his/her dwelling, the matter was resolved. It was legally impossible for one spouse to trespass in the other's dwelling. In 1979, in *State v. Herder*, the Court of Appeals of Ohio for the Tenth Appellate District considered the case of an estranged husband who entered a home owned jointly by him and his wife to remove a television.[32] The couple was living apart and in the process of obtaining a divorce.[33] The wife attempted to prevent her husband from entering the residence and alleged that he assaulted her while forcing his way into the home.[34] A jury issued an acquittal on an assault charge, but found the husband guilty of trespass.[35] The appellate court reversed the conviction for trespass and ruled that "[i]n light of the clear policy expression set forth in [Section] 3103.04, one spouse cannot be criminally liable for trespass in the dwelling of the other."[36]

> founded not merely on a community of goods, but upon the recognized obligation of both to the family and to society. The unit of society is not the individual but the family; and whatever tends to undermine the family, by the irrepealable laws of nature will crumble and destroy the foundations of society and the state. So that the peace and sanctity of the home and family are the ultimate reason for the common law rule. We do not think that we can safely hold by mere inference, that the legislature has taken such a long step in the direction of destructive legislation.

Id. at 977-78.

32. State v. Herder, 415 N.E.2d 1000 (Ohio Ct. App. 1979).

33. *Herder*, 415 N.E.2d at 1001.

34. *Id.*

35. *Id.* at 1002.

36. *Id.* at 1004. Interestingly, the trial court never mentioned Section 3103.04. Instead, it relied on *State v. Winbush*, 337 N.E.2d 639 (Ohio Ct. App. 1975), in which the Court of Appeals of Ohio for the Tenth Appellate District affirmed the conviction of a defendant for the aggravated assault, aggravated burglary and voluntary manslaughter of his estranged wife but took exception to the notion of allowing a mere trespass action to lie against a spouse.

Two additional issues surrounding the *Herder* case are important because they demonstrate judicial attempts to fashion a law that seems to "fit" a particular case but that, as a result, create discrepancies that make later interpretation of the statute difficult and uncertain. First, in *Herder*, the husband was under a previous order to vacate the residence once divorce proceedings commenced.[37] Ostensibly, this order could have been introduced at the trial level by the prosecution to show that Section 3103.04 was inapplicable in light of such an order and that charges of trespass should stand. However, the order was never introduced as evidence.[38] Notably, the appellate court did not rest on the fact that the order was never introduced at trial, and was, therefore, waived on appeal as a reason for not considering the order's potential effect. Instead, the court went further and offered:

> [A]n order to vacate is an order requiring one spouse to maintain a separate residence and is not necessarily an order excluding him from the other's dwelling, depending on the language of the order itself. In any event, the proper means to enforce a court order of that nature is by contempt proceedings in that court and not by a criminal trespass proceeding.[39]

Second, the court made clear that although one spouse could not "be criminally liable for trespass in the dwelling of the other . . . this does not mean that a spouse may not be liable for criminal acts other than trespass in connection with the gaining of entry to his spouse's dwelling."[40] Even though the court singled out assault as an example of a crime for which the husband could be charged, it seemed to be explaining how one spouse could bring criminal charges against another for activities related to or occurring after a trespass.[41]

Therein, the court stated:

> Although a husband has a possessory interest in the abode of his spouse and, therefore, may not be found guilty of simple trespass where no violence is involved because of his right to be there, he may not use violence to enforce his possessory interest. In other words, one spouse may not use violence to enter the abode of the other. *Winbush*, 337 N.E.2d at 641.

37. *Herder*, 415 N.E.2d at 1003.

38. *Id.*

39. *Id.* at 1004.

40. *Id.*

41. *Id.* Indeed, the court distinguished simple trespass from more violent crimes by distinguishing this case from *State v. Winbush*, 337 N.E.2d 639 (Ohio Ct. App. 1975) (discussed *supra*). In the last substantive paragraph of the decision, the court notes:

The Court of Appeals of Ohio for the Fourth Appellate District viewed the matter in a completely different light. In *State v. Middleton*, the court heard the appeal of a husband convicted of burglary with a physical harm specification and domestic violence against his wife in her home.[42] While the trial judge noted that the placement of Section 3103.04 (in the Domestic Relations section of the Ohio Revised Code) and the surrounding statutory subject matter (dealing with property rights of husbands and wives) leads to the conclusion that Section 3103.04 does not affect criminal liabilities, such reasoning did not survive on appeal.[43]

The appellate court reversed the conviction and utilized two time-honored approaches to statutory interpretation – first, that a court will not re-write an otherwise clear statute, and second, that criminal statutes must be construed strictly against the state and liberally in favor of the accused.[44] The court stated:

> We note [Ohio Revised Code Section] 3103.04 unequivocally states that neither spouse can "be excluded from the other's dwelling" except upon court order. The statute does not limit itself to civil matters. We may not "restrict, constrict, qualify, narrow, enlarge, or abridge" the clear meaning of a statute to suit the particular facts of a case at bar. It is our duty to give effect to the words used in a statute, and not to insert words into the statute. We again note that at the time of the offense in the instant case appellant's spouse had not obtained a court order restricting appellant from entering her dwelling. When any doubt exists concerning the interpretation of a criminal statute, the statute must be construed liberally in favor of the accused. [Ohio Revised Code Section] 2901.04(A) provides: "(A) Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." Although [Ohio

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This court held in *Winbush* that a husband could be found guilty of other offenses involving violence, such as aggravated assault, aggravated burglary, and voluntary manslaughter where, by the use of violence, he enters his spouse's dwelling armed with a shotgun for the express purpose of shooting her alleged paramour, which he accomplishes. Most importantly, however, this court in *Winbush* expressly stated that, even under those circumstances, the husband could not be found guilty of simple trespass with respect to his wife's dwelling, which is the charge herein involved. Accordingly, the trial court should have sustained the motion for acquittal.

Id.

42. 619 N.E.2d 1113 (Ohio Ct. App. 1993).
43. *Middleton*, 619 N.E.2d at 1115.
44. *Id.* at 1117.

> Revised Code Section] 3103.04 defines a privilege rather than an offense, we believe the same reasoning should apply.[45]

Paradoxically, although *Herder* purported to leave room for burglary charges when spousal violence, as opposed to simple trespass, was a factor, the *Middleton* court relied on *Herder*, notwithstanding the fact that the case before it involved just such a violent altercation between spouses. The *Middelton* court accepted the defense argument that because trespass is an element of burglary and because the *Herder* court held that the Section 3103.04 "ban against exclusion" prevents a finding of criminal trespass against one's spouse, a spouse who cannot be convicted of trespass also cannot be convicted of burglary.[46] While this was an extension of the scope of Section 3103.04 that was clearly not intended by the *Herder* court, the *Middelton* court considered itself free to adopt such a construction because the statute simply does not state whether it applies to civil actions, criminal actions, or both.

Other Ohio courts, however, have felt compelled to carve out exceptions to Section 3103.04 when spousal violence is a factor. As will be seen in the next section, these decisions have led to conflicting judicial interpretations as to the appropriateness of Section 3103.04 in the criminal arena.

III. The Spousal Violence Effect

In *State v. Herrin*, the Court of Appeals of Ohio for the Ninth Appellate District considered the appeal of an estranged husband convicted for the felonious assault and kidnapping of his wife and the burglary of the home owned by both parties.[47] Willie Herrin and his wife were living apart and in the process of divorcing; his wife was living in the couple's home.[48] On April 20, 1981, Herrin returned to the home and, upon finding the locks changed, demanded that his wife allow him in the house.[49] When she refused, he used a shotgun to gain access through a side door.[50] As his wife tried to escape, he forced her into his truck at gunpoint

45. *Id.* (citations omitted).
46. *Id.* at 1116.
47. 453 N.E.2d 1104 (Ohio Ct. App. 1982).
48. *Herrin*, 453 N.E.2d at 1105.
49. *Id.*
50. *Id.*

and threatened to kill her.[51] He eventually returned her to the home after she said that she would "cooperate" and that they could "get back together."[52] He was apprehended and arrested shortly after the incident and was subsequently convicted.[53]

On appeal, Herrin claimed that, because he was the "legal owner of an undivided one-half interest of the real estate," the burglary charge should have been dismissed.[54] In affirming the burglary conviction, the court of appeals focused solely on the crime of burglary and the meaning of trespass as defined in the Ohio Revised Code, without ever mentioning Section 3103.04.[55] Under Ohio Revised Code Section 2911.12, burglary is defined as "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure . . . with purpose to commit therein any theft offenses . . . or any felony."[56] The Code, in Section 2911.21, addresses "trespass" as follows:

> (A) No person, without privilege to do so, shall do any of the following:
> (1) Knowingly enter or remain on the land or premises of another;
> (2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows he is in violation of any such restriction or is reckless in the regard;
> (3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law . . .;
> (4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified to do so by the owner or occupant, or the agent or servant of either.[57]

In deciding the *Herrin* case, the appellate court was particularly

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51. *Id.*
52. *Id.*.
53. *Herrin*, 453 N.E.2d at 1105.
54. *Id.* at 1106.
55. *Id.* The defendant was under a court order that prevented him from coming to the home for anything other than child visitation, and, as a result, it is possible that Section 3103.04 would not have provided a defense but certainly the law was not settled at this point.
56. OHIO REV. CODE ANN. § 2911.12 (Anderson 2000).
57. OHIO REV. CODE ANN. § 2911.21 (Anderson 2000).

interested in Subsection E of Section 2911.21 which explains that "[a]s used in this section, 'land or premises' includes any land, building, structure, or place belonging to, controlled by, or in custody of another, and any separate enclosure or room or portion thereof."[58] It is this language that gave birth to the "custody and control" test that would later gain acceptance by the Ohio Supreme Court. The court explained:

> The record in the instant case is replete with evidence that the house (i.e., "land or premises") was in the custody of and controlled by defendant's wife; likewise, it was not in the custody of, or controlled by, defendant, who was living elsewhere at the time of the burglary. When defendant forcibly entered the residence without his wife's permission, he "trespassed." When he trespassed for the purpose of committing a felony therein, he committed, at the least, a burglary.[59]

In 1995, the Court of Appeals of Ohio for the First Appellate District considered the case of *State v. O'Neal*[60] and attempted to reconcile the discrepancy between the theory that criminal trespass/burglary was impossible under Section 3103.04 [unless a court order excluding one spouse from the residence of the other existed] and the notion that "the use of force or violence to enforce a possessory interest turns an authorized entrance into a trespass."[61] Carole Ann O'Neal filed a domestic violence charge and an application for a temporary protective order after her husband, James, assaulted her.[62] Thereafter, she changed the locks on the house to prevent her husband and his two children from returning to the home.[63] Four days later, after threatening his wife via

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58. OHIO REV. CODE ANN. § 2911.21(E) (Anderson 2000).

59. *Herrin*, 453 N.E.2d at 1106. It is interesting to note that the *Herrin* court refers to *Herder* as *support* for the notion that "[u]nder Ohio law an individual can trespass against property of which he is the legal owner," when the *Herder* court specifically found that, notwithstanding Section 2911.21(E), it is impossible for an individual to criminally trespass in the dwelling of his/her spouse [presumably whether he/she is or is not the legal owner] "in light of the clear policy expression set forth in [Ohio Revised Code Section] 3103.04." *Herder*, 415 N.E.2d at 1004.

60. State v. O'Neal, 658 N.E.2d 1102 (Ohio Ct. App. 1995). The decision in this case was affirmed by the Supreme Court of Ohio in January 2000. The supreme court's treatment of the test developed by the court of appeals will be discussed in Section IV.

61. *O'Neal*, 658 N.E.2d at 1104.

62. *Id.* at 1103.

63. *Id.* The marital home was leased through the Department of Housing and Urban Development. Only Carol O'Neal was named as the tenant, although an amendment was later

telephone, James returned to the home, kicked in the door and fatally shot his wife.[64] Ironically, the Hamilton County Municipal Court journalized a temporary protective order that would have prevented James from entering the residence one day later.[65]

James O'Neal was indicted on two counts of aggravated murder with death penalty and firearm specifications, one count of attempted murder, and one count of aggravated robbery.[66] The case was appealed to the appellate court by the state[67] after the trial court granted a defense motion to dismiss "all aggravated burglary charges and specifications on the ground that a husband cannot be guilty of trespass in his own home, and therefore the state could not prove an essential element of the offense."[68]

The appellate court was eager to address the larger picture of spousal burglary because, although the only matter before it was whether it was appropriate for the issue of "trespass" to be determined at trial rather than by a motion to dismiss, the court stated "we do not believe it would be helpful to the trial court to address only this procedural issue."[69] The court opened its discussion by noting, "[t]he issue of whether a person can ever be guilty of trespassing on his or her own property is a thorny one, especially in today's climate of increased domestic violence."[70]

At the outset, the court expressed its consternation with cases that held that the presence of violence could convert an authorized entrance into a criminal trespass by explaining "[a]s appealing as this proposition may be, it is adding an element to the offense of burglary which is simply not in the statute."[71] However, the court

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made that added the names of two stepchildren. *Id.*

64. *Id.*

65. *Id.* The tragic pattern of protective orders journalized or served "a day late" is not uncommon. In the Jones case, described in the opening of this comment, the protective order granted to Maggie Jones was mailed to James Jones the morning after he murdered her. Motion for Dismissal of Specifications to Counts I and IV and Dismissal of Counts II and III at 2, *Jones* (No. 99-CR-120).

66. *O'Neal*, 658 N.E.2d at 1102-03.

67. *Id.* at 1103. The trial court proceedings were stayed, pursuant to Ohio Revised Code Section 2945.67, pending the outcome of the appeal. *Id.* The state argued "that when an abusive spouse has been charged with domestic violence and the victim spouse has assumed sole control of their formerly joint residence, the abusive spouse commits an aggravated burglary when he forces his way into the home with the intent to commit a felony." *Id.*

68. *Id.*

69. *Id.* The court added, "[f]urther guidance on the legal issue raised by the state is necessary to assist the trial court on remand." *Id.*

70. *Id.*

71. *O'Neal*, 658 N.E.2d at 1104. The court referred to Ohio Revised Code Section

was equally unwilling to rule that Section 3103.04 unilaterally prevents one spouse from being charged with burglary of the other spouse's residence.[72] Instead, the court drew a distinction between criminal and civil law and held that Section 3103.04 had no application in a criminal case.[73]

The court agreed with the state's argument that "burglary statutes are designed to protect occupancy and possession, not title."[74] However, the court flatly noted that all of the cases cited by the state as support for the idea that one spouse could be prosecuted for the burglary of the other spouse's residence involved situations in which it was "clear that the spouses had established separate residences."[75] Observed the court, "[s]imply throwing a spouse out of the house and changing the locks does not establish this."[76]

The court delineated a test that was to be used when one spouse did not have a court order preventing the other from entering his/her residence. It specifically stated:

> [I]n the absence of a restraining order or an order granting one party exclusive possession of the marital residence, the question of whether one spouse has the sole possessory interest in the house depends on whether the evidence shows that *both* parties had made the decision to live in separate places. Both parties must have understood that the possessory interest of one was being relinquished, even if it was relinquished begrudgingly or reluctantly. In the absence of such a showing, there can be no finding of trespass and, hence, no aggravated burglary.[77]

2901.04(A), which states that criminal laws must be strictly construed against the state. *Id.*

72. *Id.* Moreover, the court went on to announce that "[n]or are we prepared to state that a *de facto*, as opposed to a *de jure*, separation of the parties gives them each permission to barge into the residence of the other." *Id.*

73. *Id.* The court noted that Section 3103.04 "has its historical roots in Ohio's version of the Married Women's Act" and recommended *Slansky v. Slansky*, 293 N.E.2d 302 (Ohio Ct. App. 1973) "[f]or an excellent historical analysis of its use in a proper context." *Id.*

74. *Id.* at 1104.

75. *Id.*

76. *O'Neal*, 658 N.E.2d at 1104. The court noted:

The only information in the record . . . is that four days before she was killed, Mrs. O'Neal threw her husband and his two children out of the house. She had the locks changed and was in the process of boxing up his clothes. The only information as to the defendant's whereabouts is that he told police that on the days he was out of the house he was living on the streets.

Id. at 1104-05.

77. *Id.* at 1104. The court remanded the case and instructed the trial court to permit the state to provide its evidence that both parties made the decision to establish separate

Before the Supreme Court of Ohio considered the *O'Neal* case on appeal, it heard the case of *State v. Lilly*.[78] While the case purports to clarify the confusion surrounding the issue of spousal burglary, it leaves several gaps in the law that still require interpretation.

IV. The Supreme Court of Ohio Responds

The facts in *State v. Lilly*[79] differ from many of the cases that center around acts of domestic violence that occur after one spouse forces his way into the residence of the other spouse. Harold and Jacqueline Lilly were married for approximately eight years before they separated in 1996.[80] They briefly reunited for several months, but then Mrs. Lilly left the marital residence, stayed briefly with her husband's sister, and eventually leased an apartment in her own name where she and her son began living.[81] Harold Lilly began living with his mother after the separation.[82]

Though separated, the couple continued to spend time together. Such was the case on January 26, 1997.[83] On this day, they spent the morning and afternoon together; however, Mr. Lilly became irate when his wife refused to spend the evening with him or to have sexual relations with him.[84] She alleged that he slapped her and burned her with a cigarette, and that she had nonconsensual sexual relations with him to "avoid further harm."[85] Afterward, Mr. Lilly drove her to two bars and, at one of them, she sought help from a bar employee.[86] Mr. Lilly tried to block his wife's attempt to solicit help but failed and then fled the bar.[87]

Harold Lilly then returned to his wife's apartment, cut up several

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residences. *Id.* at 1105. The court noted that "if the evidence is insufficient in this regard, the defendant may not be convicted of the aggravated-burglary-related charges and specifications." *Id.* On remand, the jury found James O'Neal guilty of two counts of aggravated murder with two death penalty specifications related to the aggravated burglary, guilty of three firearm specifications, and guilty of aggravated burglary. State v. O'Neal, 721 N.E.2d 73, 80 (Ohio 2000). At the penalty phase, he was sentenced to death. *Id.* at 80-81.

78. 717 N.E.2d 322 (Ohio 1999).

79. *Lilly*, 717 N.E.2d 322.

80. *Id.* at 323.

81. *Id.* at 323-24. The court noted, "At trial, Mrs. Lilly testified that the lease for her apartment was in her name and the defendant did not have a key. Mrs. Lilly testified that defendant did not contribute money for her apartment. She further testified that defendant knew that it was her place." *Id.* at 324.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Lilly*, 717 N.E.2d at 324.

86. *Id.*

87. *Id.*

pairs of her pants, stole her purse and her garage door opener, and detached the spark plug wires in her car.[88] Although he was hiding in the apartment when the police arrived, he was undetected.[89] He was later arrested and indicted on twelve counts of rape, two counts of attempt to commit rape, three counts of possessing criminal tools, one count of kidnapping, and one count of burglary.[90] The rape and attempted rape charges were withdrawn at trial, and the jury convicted Harold Lilly solely of burglary.[91]

The Montgomery County Court of Appeals reversed the conviction on the ground that Section 3103.04 "negated the state's proof of the element of trespass as a matter of law."[92] The Supreme Court of Ohio considered the case after granting a discretionary appeal.[93] Justice Stratton Lundberg, writing for the majority, framed the issue as "whether [Ohio Revised Code Section] 3103.04 precludes prosecution of one spouse for burglary committed in the

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88. *Id.*

89. *Id.*

90. *Lilly*, 717 N.E.2d at 323.

91. *Id.* at 325.

92. *Id.* Interestingly, the defendant never raised Section 3103.04 as a defense at trial; however, the appellate court found that this amounted to plain error. *Id.* The Supreme Court of Ohio seemed to find this interesting (and, indeed, the dissent disagreed with the use of the plain error doctrine in this case) because it remarked in a footnote that "[s]ome appellate courts, including the court in this case, have applied [Ohio Revised Code Section] 3103.04 in criminal contexts." *Id.* at 325 n.1. The Court cites *State v. Brooks*, 655 N.E.2d 418 (Ohio Ct. App. 1995), another case heard by this appellate court in Montgomery County, as support for this remark. *Id.* at 325. However, a review of that case reveals that, although a burglary conviction was the basis for the appeal, the parties were not married and the crime occurred at the apartment of a friend of the defendant's girlfriend and, hence, Section 3103.04 did not apply. The *Brooks* court remarked:

> With regard to possible defenses to the charged offense of burglary, the only "privilege" relevant to the trespass element of that charged offense that we are aware of concerns the privilege of one spouse not to be excluded from the other's dwelling, absent a court order. Thus, one spouse cannot be held criminally liable for trespass in the dwelling of the other spouse unless there exists a court order restricting one of the spouses from entering the dwelling of the other. We are not aware, however, of any similar privilege which would apply in a case such as this one where there is no marital relationship and the uncontroverted evidence demonstrates that defendant's request for entry into [lessee's] apartment was expressly refused.

Brooks, 655 N.E.2d at 423 (citations omitted).

In response to the defendant's assertion that he had been living for a time in the apartment and, therefore, had a privilege to be there, the court remarked that such a fact, even if assumed to be true, did not prevent the lessee from refusing entry at any time. *Id.* Furthermore, the court noted "that to the extent trespass is an invasion of the possessory interest in property, it is possible for a person to commit a trespass even with respect to property which he owns in whole or in part." *Id.* (citation omitted).

93. *Lilly*, 717 N.E.2d at 325.

residence of the other spouse."[94] The answer immediately followed as the court announced, "we hold that a spouse may be criminally liable for trespass and/or burglary in the dwelling of the other spouse who is exercising custody or control over that dwelling. [Ohio Revised Code Section] 3103.04 is inapplicable in criminal cases."[95]

The court began its analysis by discussing the history of the common law disabilities imposed upon married women and the statute, the Ohio's Married Women's Act, that was designed to give married women the same property rights as those enjoyed by non-married women.[96] The court then began its review of Section 3103.04, enacted twenty-six years after the Married Women's Act, and "the reason behind the spousal exclusion prohibition."[97] The court relied heavily on the history provided by the Court of Appeals of Ohio for the Eight Appellate District in *Slansky v. Slansky*[98] and remarked:

> The *Slansky* court concluded that the purpose of [Ohio Revised Code Section] 3103.04 was to "limit their [i.e., the spouses'] respective rights so that neither spouse can effect a separation, revengeful or otherwise, simply because one has full title to the marital dwelling house. Thus, one can reasonably conclude that the basis behind the spousal exclusion is the fear that one spouse would eject the other from the marital dwelling.[99]

As did the *Middleton* trial court, the Supreme Court of Ohio noted the placement of Section 3103.04 in the domestic relations chapter and observed that the 1887 Act as a whole "primarily addressed property rights as they relate to domestic relations."[100] The court also reviewed statutes in seven other jurisdictions that it found similar to Section 3103.04 and remarked that "none . . . applies this civil statute in criminal contexts."[101] With that, the court concluded:

[Ohio Revised Code Section] 3103.04 was intended to address

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94. *Id.* at 325.
95. *Id.*
96. *Id.*
97. *Id.* at 326.
98. 293 N.E.2d 302 (Ohio Ct. App. 1973).
99. *Lilly*, 717 N.E.2d at 326 (citation omitted).
100. *Id.*
101. *Id.* The court reviewed similar statutes enacted in California, Guam, Montana, New Mexico, North Dakota, Oklahoma and South Carolina. *Id.*

property ownership rights of married persons, matters of a civil nature. Privileges of a husband and wife with respect to the property of the other were not meant to be enforced criminally and do not affect criminal liabilities. Because we find that the General Assembly never intended for [Ohio Revised Code Section] 3103.04 to apply in criminal contexts, we must turn to the Criminal Code to address this issue.[102]

The court then shifted its focus from what it had just declared a "civil" law to criminal law and undertook an analysis of the crimes of burglary and criminal trespass.[103] Acknowledging that "the law of

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102. *Id.* at 326-27.

103. *Id.* at 327. Ohio Revised Code Section 2911.12 defines "Burglary" as follows:

(A) No person, by force, stealth, or deception, shall do any of the following: (1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense;

(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense;

(4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

(B) As used in this section, "occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree. A violation of division (A)(4) of this section is a felony of the fourth degree.

OHIO REV. CODE ANN. § 2911.12 (Anderson 2000).

Ohio Revised Code Section 2911.21 defines "criminal trespass" as follows:

(A) No person, without privilege to do so, shall do any of the following:

(1) Knowingly enter or remain on the land or premises of another;

(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows he is in violation of any such restriction or is reckless in that regard;

(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified to do so by the owner or occupant, or the agent or servant of

burglary evolved out of a desire to protect the habitation" and "to protect the dweller," the court held "that custody and control, rather than legal title is dispositive."[104] The court directly answered the question of whether a spouse could be charged for burglarizing a home to which he/she holds legal title by stating, "in Ohio, one can commit a trespass and burglary against property of which one is the legal owner if another has control or custody of that property."[105]

The court also took what seems to be an extra step by noting that, assuming arguendo, that the defendant believed he had a right to his wife's property, "civil, peaceful avenues of redress exist to enforce the rights of a person who believes he or she has been wrongfully excluded from certain property."[106] The court had little trouble finding sufficient evidence to support Harold Lilly's conviction for burglary and reversed the decision of the court of appeals.[107]

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either.

(B) It is no defense to a charge under this section that the land or premises involved was owned, controlled, or in custody of a public agency.

(C) It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.

(D) Whoever violates this section is guilty of criminal trespass, a misdemeanor of the fourth degree.

(E) As used in this section, "land or premises" includes any land, building, structure, or place belonging to, controlled by, or in custody of another, and any separate enclosure or room, or portion thereof.

OHIO REV. CODE ANN. § 2911.21 (Anderson 2000).

104. *Lilly*, 717 N.E.2d at 327. As further support for this theory, the court noted that Section 2911.21(E) of the Ohio Revised Code did not require that legal title be established before a criminal trespass violation could occur, but instead, required only that the land or premises be "controlled by, or in the custody of another." *Id.*

105. *Id.* It is worth noting that the court did not have to stretch this far under the facts involved. In the *Lilly* case, Jacqueline Lilly leased a separate apartment in her own name. Her estranged husband did not have a key and did not contribute to the financing of the apartment. He also kept no belongings at his wife's residence. *Id.*

106. *Id.* Again, the court relied on the criminal trespass statute, Section 2911.21(C), and stated "there is no privilege to use force, stealth, or deception to regain possession." *Id.* This is further than the court needed to go because, in this case, the defendant went to his wife's residence to destroy her clothing, disable her car, and steal her purse. He never asserted that he was attempting to "regain possession" of property that he considered to be his or that he was entitled to his wife's personal property. *Id.* at 328.

107. *Id.* Justices Cook and Moyer concurred in the judgment of the court but disagreed with the appellate court's use of the "plain error" doctrine. Justice Cook offered that "[e]ven if [Ohio Revised Code Section] 3103.04 would have obviated the element of trespass so as to aid Lilly's defense, the failure to raise the issue decides the case." *Id.* By way of explanation, Justice Moyer offered the following:

Appellate courts may only invoke the plain error doctrine "with the utmost caution,

The issue of spousal burglary came before the Supreme Court of Ohio again in January 2000, in the *State v. O'Neal*[108] case wherein the common thread of domestic violence reappeared in horrifying fashion. The supreme court appeared bent on providing a much more detailed account of the verbally and physically abusive relationship between James Derrick O'Neal and Carol O'Neal than did the appellate court five years earlier. The court noted that Carol applied for a temporary protection order on December 7, 1993, after she reported to police that her husband "struck her in the face numerous times, choked her, shoved her to the ground, and kicked her."[109] Carol also told the police that her husband had "recently moved out of the house."[110]

Notwithstanding this fact, she remained terrified that her husband would return to the home.[111] One of her co-workers testified that she feared for her life, that while she was at work she was "nervous, shaky, and drained," and that "whenever the telephone rang at work, '[Carol] would be shaking, scared, thinking it was going to be [James] on the phone.' "[112] On the day of the murder, James did telephone Carol at work and stated, "Bitch, it ain't over yet."[113]

And it was not over. James O'Neal returned to the home he formerly shared with his wife and shattered the glass in the front door of the home.[114] When his wife heard this, she:

> ran upstairs screaming, and she and her youngest three children retreated into a bedroom. She directed the children into a closet and she stood pushing on the bedroom door trying to keep [James] from entering. Two of Carol's children,

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under exceptional circumstances." Plain error is "obvious error prejudicial to a defendant, neither objected to nor affirmatively waived by him, which involves a matter of great public interest having substantial adverse impact on the integrity of and the public's confidence in judicial proceedings. The error must be obvious on the records, palpable, and fundamental, and in addition it must occur in exceptional circumstances where the appellate court acts in the public interest because the error affects 'fairness, integrity, or public reputation of judicial proceedings.' "

Id. (citations omitted). Admittedly, it is hard to accept that this defendant's conviction for burglary, under the facts as outlined, had "an adverse impact on the integrity of and the public's confidence in judicial proceedings."

108. 721 N.E.2d 73 (Ohio 2000).
109. *O'Neal*, 721 N.E.2d at 78.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *O'Neal*, 721 N.E.2d at 78.

> who were looking out of the closet, testified that [James] fired a shot at the bedroom door and that Carol fell to the floor behind the bedroom door. [He] then entered the bedroom and, while standing over Carol, fired two or three shots at her.[115]

When he was questioned by the police, James O'Neal admitted that he knew his wife had contacted the police after he assaulted her on December 7, that "he had not been living at the Plainville Road home," that he " 'moved out' when Carol demanded that he and his sons leave the home," that he had since been "living on the streets," that he "entered the residence by kicking the front door glass," and that he "chased Carol up the stairs."[116] Nonetheless, his appeal to the Supreme Court of Ohio contended "that the holding in *O'Neal I*[117] is in direct conflict with [Ohio Revised Code Section] 3103.04, which, according to appellant, provided him with a privilege, absent a court order, to enter the residence leased by his spouse."[118]

The Supreme Court of Ohio spent little time on this contention and reiterated its less than three month old holding in *State v. Lilly*[119] that Section 3103.04 was inapplicable in criminal cases.[120] The court also rejected O'Neal's contention that the appellate court's ruling was an " 'unnecessary act of judicial legislation' redefining criminal trespass."[121] Working through the same analysis of the law of burglary and the definition of trespass as it did in *Lilly*, the court concluded that:

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115. *Id.* James O'Neal then found Carol's fourteen year old son and, according to the boy, "pointed the gun at his neck and pulled the trigger at least twice." The gun, however, did not fire and James O'Neal fled the house. *Id.*

116. *Id.* at 79. The supreme court noted that James O'Neal also "confessed that he forced his way into the bedroom and as Carol lay 'huddled' on the floor behind the bedroom door 'crying and screaming' he shot her 'two or three times.' Appellant also stated that he 'wanted to teach her a lesson,' and that he did not care if she died." *Id.*

117. Again, the holding by the appellate court was as follows:

> [I]n the absence of a restraining order or an order granting one party exclusive possession of the marital residence, the question of whether one spouse has the sole possessory interest in the house depends on whether the evidence shows that *both* parties had made the decision to live in separate places. Both parties must have understood that the possessory interest of one was being relinquished, even if it was relinquished begrudgingly or reluctantly. In the absence of such a showing, there can be no finding of trespass, and hence, no aggravated burglary.

O'Neal, 658 N.E.2d at 1104.

118. *O'Neal*, 721 N.E.2d at 81 (footnote omitted).

119. 717 N.E.2d 322 (Ohio 1999).

120. *O'Neal*, 721 N.E.2d at 81.

121. *Id.* at 81-82.

> *[A]ny* person can indeed commit a trespass against property that belongs to, is controlled by, or is in the custody of someone else. Therefore, a spouse can be convicted of trespass and aggravated burglary in the dwelling of the other spouse who owns, has custody of, or control over the property where the crime has occurred.[122]

The court turned away contentions that there was insufficient evidence to establish that James O'Neal trespassed against the property where Carol resided.[123] Pointing out that Carol "was in sole custody and control over the home," that she was the "lessee under the lease agreement," "that [James'] name was not on the lease," that James moved out after he assaulted his wife on December 7, that she "filed a motion for a temporary protection order," that he "admitted to the police that, prior to the day of the murder, he had moved out and no longer lived in the home," and that he "shattered the glass in the front door, entered the residence, and killed Carol," the court ruled that there was sufficient evidence to show that James did not live at the residence and that it was in "Carol's sole custody and/or control."[124] Accordingly, the element of trespass in the aggravated burglary charge was met and James O'Neal's conviction affirmed.[125]

The *O'Neal* decision reflects the current state of the law in Ohio. Before commenting on the potential shortcomings of the law and offering suggestions to strengthen it as well as to remove lingering questions, it is important to review the manner in which other states have handled similar issues.

V. Other States' Treatment of Spousal Burglary

To gain a full understanding of spousal burglary, it is helpful to review the manner in which other states, via statute and/or case law, have treated the issue. Although Ohio appears to have been the only state with the "no ousting" provision when it enacted its amendment to the Married Women's Act, several states have since added similar provisions.[126] In other states, the issue is still decided

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122. *Id.* at 82.

123. *Id.*

124. *Id.*

125. *O'Neal*, 721 N.E.2d at 82.

126. *See, e.g.*, Cal. Fam. Code §§ 752 and 753 (West 2000) (providing that although neither spouse has any interest in the separate property of the other [unless otherwise provided by statute], neither spouse can be excluded from the other's dwelling); Mont. Code Ann. § 40-2-201 (2000) ("Neither husband nor wife has any interest in the property of the

purely on a common law basis. What follows is a state-by-state analysis.

Alabama

In 1990, the Court of Criminal Appeals of Alabama reviewed the case of Leroy White, who was sentenced to death by electrocution for the capital burglary-murder of his wife, Ruby White.[127] One of the twenty issues on appeal was "whether one spouse may burglarize the residence of the estranged spouse" and this was an issue of first impression in Alabama.[128] Leroy and Ruby White separated in the autumn of 1988 after repeated marital difficulties, and Ruby moved into a shelter for victims of domestic violence.[129] Thereafter, Ruby filed for divorce and during a pendente lite hearing, the parties agreed that Leroy would move out of the marital residence and that Ruby and her two children would resume living there.[130] The day following the hearing, Leroy removed all of his belongings from the home.[131] Ruby, her children, and her sister commenced living in the home and Ruby changed the locks to prevent her husband from returning to the residence.[132]

However, Leroy White did return to the home twice on October 17, 1988, and a horrific sequence of events followed.[133] Upon arriving the first time, he nearly ran over his seventeen month old daughter and then proceeded to pick up the child and drive away with her.[134] He returned shortly thereafter armed with both a

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other, except as mentioned in 40-2-102, but neither can be excluded from the other's dwelling unless enjoined by a court."); N.M. STAT. ANN. § 40-3-3 (Michie 2000) ("Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling."); N.D. CENT. CODE § 14-07-04 (2000) ("Except as otherwise provided . . . neither the husband nor the wife has any interest in the property of the other, but neither can be excluded from the other's dwelling."); OKLA. STAT. tit. 43, § 203 (2000) ("Except as mentioned in the preceding section neither husband nor wife has any interest in the separate property of the other, but neither can be excluded from the other's dwelling.").

127. White v. State, 587 So.2d 1218 (Ala. Crim. App. 1990).

128. *White*, 587 So.2d at 1222.

129. *Id.* The record indicated that during one of the domestic disputes between the parties, the defendant shot his wife in the leg. *Id.*

130. *Id.* The court noted that "the residence . . . was owned solely by Ruby White prior to her marriage." *Id.*

131. *Id.* at 1224.

132. *Id.* at 1222.

133. *White*, 587 So.2d at 1222-23.

134. *Id.* at 1223. The evidence showed that prior to this first trip, Leroy White purchased a shotgun at one pawnshop and ammunition for the gun at a separate pawnshop. *Id.* at 1222-23.

shotgun and a pistol.[135] Upon seeing this, Ruby and her sister fled to the home and attempted to lock themselves inside.[136] Ruby sent her oldest child to hide under a bed; her youngest child remained in Leroy's car.[137] The following description of events is taken from the trial judge's "finding of facts summarizing the crime":

> The defendant then came up to the front door of 2217 Evans Drive and finding it locked, shot the glass out of the storm door and shot the lock off the wooden front door. He then kicked the door open, entered the house and began to scuffle with Ruby and her sister, Stella. As Stella tried to flee the house, the defendant ran out on the front porch and shot four times. Stella fell in the yard (having been wounded in her right arm and right leg).
>
> The defendant then went back into the house and confronted Ruby who was begging and pleading for her life. After a brief confrontation, Ruby ran out into the front yard at which time the defendant told her to stop or he would blow her legs off. She stopped and the defendant confronted her with the shotgun. Ruby grabbed the barrel of the shotgun and continued to plead for her life. Her daughter Latonia was in the defendant's car and her son Brian was in the house.
>
> Finally, the defendant shoved Ruby away from the gun and fired at her at point blank range with the double-aught buckshot. The blast tore the flesh from her right arm as she tried to shield herself and the pellets penetrated her chest and abdomen. Ruby fell to the ground moaning but she was not dead. Testimony revealed that the defendant then went back into the house and called for Brian to come out of his hiding place. When Brian came out, the defendant told him to tell his daddy that ". . . when I get out of this, I'm going to kill him, too."
>
> The defendant then went back outside, walked up to where Ruby lay on the ground moaning and said, "Bitch, you ain't dead yet." He then went to his car, re-loaded the shotgun, picked up his 17-month old daughter and walked back over to where Ruby lay on the ground. As he placed the muzzle of the shotgun to her neck, he said, "Bitch, this is the last thing you

135. *Id.* at 1223.
136. *Id.*
137. *Id.*

will see." He then smiled and pulled the trigger.

The blast tore a whole in Ruby's neck where the gunshot entered and blew off the back side of her head where it exited.

At this time, the police arrived and the defendant surrendered without incident.[138]

The appellate court began its analysis by noting that "burglary, like trespass, is an offense against the possession, and hence the test for the purpose of determining in whom the ownership of the premises should be laid . . . is not the title, but the occupancy or possession at the time the offense was committed."[139] The court observed that the facts in this case – that the parties were separated at the time of the offense, that they were in the process of divorcing, that the defendant orally agreed (at a hearing at which he was represented by an attorney) to move out of the house, that he did actually move out, that he took "all of his belongings with him," and that the defendant's wife changed the locks immediately thereafter – were sufficient to find him guilty of burglary.[140]

Because this was a case of first impression, the court relied heavily on the law of other jurisdictions.[141] Ultimately, it sided with

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138. *White*, 587 So.2d at 1223. A full understanding of the living arrangements of the White's and the extraordinarily violent circumstances surrounding the death of Ruby White is necessary to appreciate the absurdity of the appellant's defense that he did not "knowingly and unlawfully [enter] his wife's residence with the intent to commit the crime of murder" and that "he was licensed or privileged to enter the marital residence." *Id.* It is also helpful in understanding how completely preposterous an argument asserting a right to consortium is in cases involving domestic violence.

139. *Id.* The court also remarked that, under Alabama law, "A person 'enters or remains unlawfully' in or upon premises when he is not licensed, invited or privileged to do so." *Id.* (citing ALA. CODE § 13A-7-1(4) (1975)).

140. *Id.* at 1224.

141. *Id.* For example, the court reviewed decisions from the states of Florida, Indiana, Kentucky, Louisiana, North Carolina, Ohio, Virginia, and Washington that dealt with the issue of spousal burglary. The court also reviewed the law as stated in 12A C.J.S. *Burglary* § 38 (1980) that explains that:

> Some authorities broadly state that a man cannot burglarize his wife's home, and it is considered that the burglary statute is not designed to protect against entries by persons occupying a marital or immediate familial relationship with the legal possessor of property. So, it is held that in the absence of a legal separation agreement, or restraining order, or court decree limiting or ending the consortium rights of the parties, each spouse has a legal right to be with the other spouse on premises possessed by either or both spouses so long as the marriage exists, and entry onto such premises by either spouse cannot be a burglary, although a court order will negate any rights to enter the premises. While "the offense [of burglary] is

the Florida Supreme Court's decision in *Cladd v. State* that a "husband, who is physically but not legally separated from his wife, can be guilty of burglary when he enters premises, possessed only by the wife and in which he has no ownership or possessory interest, without his wife's consent and with intent to commit an offense therein."[142] The court rejected "the position that there is any absolute right on the part of one spouse to be with the other against the other's wishes, giving a right to break into the home of the other with the intent to commit a crime."[143] After reviewing the nineteen additional grounds for appeal, the court affirmed the defendant's conviction and death sentence.[144]

California

California's Family Code Section 753, which is essentially identical to Ohio Revised Code Section 3103.04, provides that "neither spouse may be excluded from the other's dwelling."[145] In 1990, the Court of Appeals of California for the Fifth Appellate District considered whether such a statute affected the conviction of an estranged husband for the burglary of a cabin owned by his in-laws but utilized by his wife.[146] Gary and Gina Davenport married in 1984 and in May of 1985 Gina went to live in her parents'

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not committed by one who breaks and enters his own dwelling or other building," "it has, however, been held that the mere existence of the marriage relationship does not preclude the one spouse from committing burglary against the other spouse."

Id. (citing 12A C.J.S. *Burglary* § 38 (1990 Supp.) (footnotes omitted)).

142. *Id.* (quoting Cladd v. State, 398 So.2d 442 (Fla. 1981)). This case is discussed in detail later in this section.

143. *White*, 587 So.2d at 1225. The court noted that it was adopting the position of courts in Florida, Ohio and Washington and remarked, "The common thread running through these cases is that the mere existence of the marriage relationship does not put a spouse's separate property beyond the protection of the law and subject to the depredation of the other spouse." *Id.* at 1226.

144. *Id.* at 1236. Following its review of the propriety of a death sentence the court remarked, "As was the trial court, this Court is struck by the merciless, brutal, and cold-blooded depravity of the defendant." *Id.*

145. CAL. FAM. CODE § 753 (West 2000). The statutory predecessor to Section 753 was Section 5102(a) of the California Civil Code, which provided that "neither husband nor wife has any interest in the separate property of the other, but neither can be excluded from the other's dwelling . . ." The section was repealed in 1994, but the rule was continued in Sections 752-54 of the California Family Code. Section 752 provides: "Except as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other." CAL. FAM. CODE § 752 (West 2000). Section 753 provides: "Notwithstanding Section 752 . . . neither spouse may be excluded from the other's dwelling." CAL. FAM. CODE § 753 (West 2000).

146. People v. Davenport, 268 Cal. Rptr. 501 (Cal. Ct. App. 1990).

cabin.[147] In July of 1985, Gary joined her and they lived there intermittently with Gina's parents until early 1986.[148] At that point, the Davenports separated, Gary moved out and returned his keys to the cabin to his mother-in-law; however, items of his personal belongings remained in the cabin.[149] On September 5, 1986, he and an accomplice drove separately to the cabin, smashed windows on two floors of the cabin in order to gain entry, and stole items belonging to Gina and her mother.[150] They were arrested after stealing a nearby truck, and Gary was charged with burglary.[151]

Gary Davenport argued that he possessed "an unconditional right to enter [his in-law's] cabin under [current California Family Code Section 753]" and claimed that the statute was "triggered" by three facts:

(1) His marriage to Gina;
(2) Gina being a resident of the cabin; and
(3) The absence of any court proceeding to terminate their marriage or otherwise limit their respective rights and obligations to one another and, specifically, to occupancy of the cabin. He reasoned that the statutory prohibition against exclusion is equivalent to an unconditional right of entry.[152]

The court rejected these contentions, noting that there was "substantial evidence supporting the conclusion that [Davenport] did not have the right to enter the cabin on September 5, 1986, or that any such right was conditional."[153] The appellate court

147. *Davenport*, 268 Cal. Rptr. at 502.

148. *Id.*

149. *Id.*

150. *Id.* These activities followed a crime spree that occurred two days earlier wherein the defendant and his accomplice ransacked and stole items from the office of a maintenance yard located next to the cabin in question. One of the vehicles utilized was a flatbed truck belonging to Gina Davenport. *Id.*

151. *Id.* at 503.

152. *Davenport*, 268 Cal. Rptr. at 503.

153. *Id.* at 505. The court substantiated this conclusion by offering the following:

> Appellant and Gina had been separated for months prior to the burglary. Gina continued to live at the cabin, and appellant lived elsewhere. He relinquished his keys at [his mother-in-law's] request and had already taken possession of some of his personal property. Gina instructed him not to take his remaining personal property unless she was present. She boxed and stored his items upstairs so he wouldn't have any reason to set foot downstairs, and told him so. Though no dissolution or legal separation proceeding had been filed when the burglary occurred, serious difficulties in the marital relationship existed and appellant no longer had a possessory right to enter the [in-law's] cabin. Gina did not have an ownership interest in the cabin. At

concluded, "appellant did not have an ownership or tenancy interest entitling him to enter the cabin without permission. His right of entry under [the statute] was qualified to a lawful purpose . . . [the statute] does not endow one with the right to burglarize the dwelling of his or her estranged spouse."[154]

Colorado

In 1995, the Supreme Court of Colorado considered the case of *People v. Johnson* wherein it reviewed the conviction of a husband convicted of second degree burglary and first degree criminal trespass for his unlawful entry into his estranged wife's apartment.[155] Eric and Tina Johnson were married for slightly more than one year before Tina moved out of the marital home and entered into a lease arrangement for a separate apartment.[156] At no time did Eric Johnson share this apartment, and his name did not appear on the lease.[157]

Shortly thereafter, Tina Johnson filed a petition to dissolve her marriage.[158] Approximately eight months after Tina Johnson leased the apartment, her husband appeared and entered her residence twice on the same day.[159] During the first encounter, he verbally assaulted his wife and physically assaulted her friend; during the second encounter, he "kicked in the door" of her residence.[160] Eleven days later, the dissolution of the couple's marriage became final.[161]

Eric Johnson argued that, because he and his wife were still legally married at the time of the offenses, he had a privilege to enter the residence and, as a result, he could not be convicted of trespass or burglary.[162] He relied upon a Colorado statute that declares that property acquired by either spouse subsequent to the marriage, but prior to a legal separation, is presumed to be marital

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best she had a tenancy at will.
Id.

154. *Id.*

155. 906 P.2d 122 (Colo. 1995).

156. *Johnson*, 906 P.2d at 123.

157. *Id.*

158. *Id.* Eric Johnson was not in the State of Colorado at the time; the state was unable to make personal service on him. As a result, service was made by publication. *Id.*

159. *Id.* At no time did Mrs. Johnson request a restraining order against her husband. *Id.*

160. *Id.*

161. *Johnson*, 906 P.2d at 124.

162. *Id.*

property.[163] He reasoned that, because his wife leased the apartment prior to a final dissolution of their marriage, the apartment was considered marital property in which he held an interest.[164]

The trial court granted Eric Johnson's motion to dismiss all charges on the ground that he could not be convicted of burglary or trespass because he and his wife were still married at the time of the incidents, there was no restraining order against him at the time and, as a result, his entry was not unlawful.[165] The Supreme Court of Colorado reversed the decision and ruled that, although the defendant "may have had some right to assert an economic interest in the lease when the Johnson's property was divided in their dissolution," he had no "possessory right or a license or privilege to make an unauthorized entry" into his wife's separate apartment.[166] Noting that the gravamen of a burglary charge involves "the possessory rights of the parties, and not their ownership rights," the court held that "Mr. Johnson's purported ownership interest in [his wife's] lease does not equate with a possessory interest that shields him from charges of trespass and burglary."[167] As a result, the court ordered the burglary and criminal trespass charges reinstated.[168]

Florida

A very thorough review of the treatment of spousal burglary can be found in the courts of Florida. This is a result of two cases,

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163. *Id.* (referring to COLO. REV. STAT. § 14-10-113(3) (1987)).

164. *Id.*

165. *Id.* at 123.

166. *Johnson*, 906 P.2d at 124, 126.

167. *Id.* at 125. As in the *White* case in Alabama, this was an issue of first impression in Colorado. Again, as did the Alabama court, the Supreme Court of Colorado reviewed the treatment of spousal burglary in other jurisdictions, including Alabama, Florida, Indiana, Kentucky, Louisiana, Maryland, North Carolina, Texas, Virginia and Washington. After concluding that "[a] majority of courts agree that the mere existence of the marriage relationship does not put a spouse's separate property beyond the protection of the law," the court noted that only Ohio had "reached a different result." *Id.* at 125-26. The court described Section 3103.04 of the Ohio Revised Code as granting "a privilege of entry by spouses into the dwelling of the other spouse absent a restraining order" and remarked that "[a]bsent a similar Colorado statute granting a privilege, there is no comparable support for the trial court's finding that Mr. Johnson had a privilege of entry." *Id.* at 126. Interestingly, the court remarked that "even under the Ohio statute, a spouse 'may not use violence to enforce his possessory interest. In other words, one spouse may not use violence to enter the abode of the other.' " *Id.* (quoting State v. Winbush, 337 N.E.2d 639, 641 (Ohio Ct. App. 1975)).

168. *Johnson*, 906 P.2d at 126.

Vazquez v. State and *Cladd v. State*, that resulted in the Supreme Court of Florida overruling the Court of Appeals of Florida for the Third District.[169] The rationale of each court, as well as the dissents by several justices of the supreme court, provide an excellent overview of the complexity of this issue and the opposite ends of the judicial spectrum embraced by courts when deciding whether one spouse can be charged with burglarizing the other spouse's residence.

In 1977, the Court of Appeals of Florida for the Third District reviewed the case of Francisco Vazquez, who was convicted for burglary and battery of his estranged wife.[170] At the time of the offense, the couple had been physically separated for over a year, but neither party had taken steps to legally end the marriage and neither had asked the courts for a restraining order.[171] Mr. Vazquez returned to the couple's apartment in the "early morning hours" of December 7, 1975, knocked on the door, and "demanded that his wife let him in."[172] She refused, alleging that she feared he would harm her, and called the police as well as neighbors to assist her.[173] Eventually, her husband "broke the apartment door down, entered the apartment and physically struck his wife in the face with his fists causing certain injuries."[174]

At a bench trial, Francisco Vazquez was convicted of burglary and battery and sentenced to one year in the county jail.[175] In appealing his burglary conviction,[176] he argued that he had a legal right to be with his wife that, as a matter of law, precluded him from being charged with burglary.[177] The appellate court agreed,

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169. Vazquez v. State, 350 So.2d 1094 (Fla. Dist. Ct. App. 1977); Cladd v. State, 398 So.2d 442 (Fla. 1981).

170. *Vazquez*, 350 So.2d at 1095.

171. *Id.* at 1096. Mr. Vazquez formerly shared the apartment with his wife, and the bills, although paid by Mrs. Vazquez, were in his name. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* Subsequently, neighbors arrived and prevented Mr. Vazquez from further harming his wife. *Id.*

175. *Vazquez*, 350 So.2d at 1096.

176. *Id.* The defendant also appealed his battery conviction, but at "oral argument . . . he quite properly abandoned this position since it . . . [was] clear from the record that the evidence was more than sufficient to sustain the battery conviction." *Id.*

177. *Id.* At trial, the motion for judgment of acquittal (pertaining to the burglary charge) was made at the close of the state's case. What is striking about this is that, because the defendant did not renew the motion at the close of all the evidence in the case, the appellate court was required to review only evidence presented by the State and to resolve "all reasonable inferences from the evidence in favor of the state." *Id.* at 1095 (citation omitted). Ultimately, this court – reviewing only the most damaging portions of the evidence;

relying on the portion of the Florida burglary statute that provides an exception to the illegality of unconsensual entries for a person who is "licensed, invited or otherwise has a legal right to be on the premises."[178] The court reasoned:

> In the instant case, the wife had a possessory right in the apartment which the defendant entered without the wife's consent with intent to physically abuse the wife. Ordinarily, this would constitute a burglary if the parties had been unmarried. But the parties were married and this fact makes a crucial difference because the defendant for the purposes of the burglary statute had a legal right to be on the premises with his wife at the time of the entry.[179]

What was most disturbing about the appellate court's rationale in this case arises from the following quote:

> One of the essential characteristics of the marriage relationship is consortium. Consortium means much more than sexual relations and means, also, affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance so necessary to a successful marriage. Consortium necessarily implies that each spouse has a legal right to be with the other which relationship neither one can unilaterally terminate.[180]

Such a rationale is far more illogical and dangerous than merely relying on a statute, such as Section 3103.04 of the Ohio Revised Code, to uphold a defendant's "right to burglarize" his spouse's residence. In the latter, it was rational (if not desirable) to read the

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that is, that which was presented by the state – agreed that, as a matter of law, the defendant could not be charged with burglary despite the violent nature of the entry and the long absence from the apartment. *Id.*

178. *Id.* at 1096. Section 810.02 of the Florida Statutes provides as follows:

(1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

(2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . if, in the course of committing the offense, the offender:

(a) Makes an assault upon any person.

(b) Is armed, or arms himself within such structure, with explosives or a dangerous weapon.

FLA. STAT. ANN. § 810.02 (West 1975).

179. *Vazquez*, 350 So.2d at 1097.

180. *Id.*

statute as it is written and conclude that *statutorily* neither spouse could exclude the other from his/her dwelling in the absence of a court order. In cases like *Vazquez*, however, the courts return to archaic and irrational arguments that some twisted notion such as "consortium" or "family harmony" provide one spouse (usually the husband) with the *legal right* to enter the other's residence by any means necessary. Quite simply, it makes no sense to argue that a public policy supporting the sanctity of the family or one spouse's *right* to "affection," "solace," "comfort," "companionship," or "fellowship" makes it permissible for one spouse to violently enter the residence of the other in order to commit some other (usually violent) illegal act.[181]

Fortunately, the Supreme Court of Florida visited this issue in 1981 when it heard the case of *Cladd v. State*.[182] The facts in *Cladd* were similar to those in *Vazquez*, except that Mr. Cladd at no time resided in his wife's separately leased apartment.[183] The couple had been separated for nearly six months when the defendant arrived at his wife's apartment, gained entry using a crowbar, assaulted her and attempted to "throw her over the second floor stair railing."[184] He failed but returned the next morning and again attempted to gain entry; however, he fled when police arrived.[185]

Relying on the Third District's opinion in *Vazquez*, the defendant moved to dismiss charges of burglary and attempted burglary and argued that, because "the victim was his wife, he was licensed or invited to enter her apartment as a matter of law."[186] The trial court agreed; however, the State appealed and the Court of Appeals of

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181. Ironically, the court stated, "Traditionally, the criminal law has intervened in [domestic disputes] at the point of threatened or actual violence against either spouse, or when one spouse steals the separate property of the other spouse." *Id.* In the case before the court, Mrs. Vazquez testified that she did not open the door because she feared her husband would harm her. *Id.* at 1096. Regrettably, she was correct; her husband sought entry to the residence for the sole purpose of physically assaulting her. *Id.* at 1097. Such facts demand that one ask "what, if not this, constitutes the point of threatened or actual violence?" The court continued:

> We cannot conceive that the legislature intended to apply the burglary statute with its harsh criminal penalties to domestic disputes within the immediate family unit over the right to be on certain premises. Such disputes have been and should continue to be treated as purely civil matters to which the burglary statute is inapplicable.

*Id.*The court saw "no valid reason for departing from this sound and well-established precedent." *Id.*

182. 398 So.2d 442 (Fla. 1981).

183. *Cladd*, 398 So.2d at 443.

184. *Id.*

185. *Id.*

186. *Id.*

Florida for the Second District reversed the decision.[187] The appellate court reasoned that, although "each spouse has the legal right to the other's company," it did "not believe that this includes the right to enter the other's apartment without permission with the intent to assault the other."[188]

The court of appeals' decision was appealed to the Florida Supreme Court. While noting at the outset that "the factual situation [at bar] is narrow,"[189] the Florida Supreme Court rejected "the defendant's contention that the marriage relationship and the right of consortium deriving therefrom preclude the State from ever establishing the nonconsensual entry requisite to the crime of burglary" and "disapprove[d] the Third District's contrary ruling in *Vazquez*."[190] The court concluded, "[s]ince burglary is an invasion of the possessory property rights of another, where premises are in the sole possession of the wife, the husband can be guilty of burglary if he makes a nonconsensual entry into her premises with intent to commit an offense."[191] Thus, the court reinstated the

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187. *Id.*

188. State v. Cladd, 382 So.2d 840, 841 (Fla. Dist. Ct. App. 1980).

189. *Cladd*, 398 So.2d at 443.

190. *Id.* at 444. The court seemed convinced that the Third District realized that it created too broad of a rule in the *Vazquez* case (i.e., that, as a matter of law, a spouse could not be guilty of burglary because of a legal right to be with the other spouse) because of its contradictory holding less than one year later in *Wilson v. State*, 359 So.2d 901 (Fla. Dist. Ct. App. 1978). The supreme court, comparing the appellate court's ruling in *Vazquez* with its later ruling in *Wilson*, remarked:

> Later, in *Wilson v. State* . . . the Third District addressed the issue of whether entry into a father-in-law's home, where defendant's wife was temporarily residing, with intent to assault her constituted burglary. Distinguishing *Vazquez* on the basis that, in *Wilson*, the premises were possessed by the wife's father, the Third District affirmed defendant's burglary conviction and said that the husband's legal right to be with his wife did not establish consent where the wife was living in premises which were not solely possessed by her. The right of consortium alone was not sufficient to give the husband a right of entry into these premises. Yet, the legal right of consortium was the basis upon which the Third District premised its determination of implied consent in *Vazquez*.

Id.

191. *Cladd*, 398 So.2d at 444. The court rationalized that this type of burglary analysis was consistent with its earlier ruling that one spouse could be charged with larceny of the other spouse's separate property. *Id.* Drawing from language in *State v. Herndon*, 27 So.2d 833 (Fla. 1949), a case wherein the court reached such a result, the court reiterated:

> In a society like ours, where the wife owns and holds property in her own right, where she can direct the use of her personal property as she pleases, where she can engage in business and pursue a career, it would be contrary to every principle of reason to hold that a husband could ad lib appropriate her property. If the common-law rule was of force, the husband could collect his wife's pay check, he could direct its use, he could appropriate her separate property and direct the course of her career or business if she has one. We think it has not only been abrogated by

defendant's convictions for burglary and aggravated burglary.[192]

It is important to recognize that the majority view of the Supreme Court of Florida was confined to the "narrow" facts of the case.[193] The fiction of the marital harmony and right of consortium argument was very much alive in two strongly worded dissents. For example, Justice Boyd found the facts in *Vazquez* and *Cladd* virtually indistinguishable and exalted the right of consortium by remarking that "[u]nder long-established principles of Anglo-American law, one of the essential incidents of the marital state is the right of spouses to the company and comfort of one another."[194] He suggested:

> Consortium is so basic as an incident of marriage that it should not be undermined except by a clear legislative statement of the public policy of this state. The legislature should reconcile the matter of consortium rights with the elements of any crime, and should do so very carefully when dealing in the context of a crime carrying a possible sentence of life imprisonment.[195]

It boggles the mind to think that there was a shred of consortium worth protecting in either the *Vazquez* or *Cladd* cases. In both instances, an estranged husband used an inordinate amount of force to gain unannounced and unwanted entry to a home possessed solely by his wife for the singular purpose of physically assaulting her. But for the fact that the parties were still legally married, the defendants would have been convicted of burglary with little, if any, difficulty. If burglary statutes are designed to protect the dweller, to protect possession, and to protect habitation, an individual surely is not entitled to less protection of these interests simply because she is married to the aggressor.[196]

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law, it has been abrogated by custom, the very thing out of which the common law was derived.

Id. (quoting *Herndon*, 27 So.2d at 835).

192. *Id.*

193. *Id.* at 443.

194. *Cladd*, 398 So.2d at 444.

195. *Id.*

196. Yet this form of discrimination still creeps into modern day opinions. Justice England also dissented in the *Cladd* case and noted:

> Like an anxious Pandora endeavoring to stuff the ills of the world back into her box, the majority endeavors to confine interspousal crimes to the factual situation of this case. As Pandora and the world sadly learned, however, once the box is opened there is no way to contain the ephemeral evils which escape.

Id. at 445.

The rationale provided by this dissent is so utterly disturbing that it warrants a paragraph-by-paragraph analysis and refutation. Justice England begins by offering that, "The majority holds today that one spouse may commit burglary against another. This new common law doctrine has emanations which go far beyond this case. This becomes evident when the case is viewed preliminarily from the perspective of what is not involved here." *Id.* He notes:

> First, this is not a prosecution for assault. Any discussion with regard to the husband's physical abuse or intended physical abuse of his wife is extraneous to the legal question presented. Mr. Cladd may or may not be prosecuted for his violent acts toward his wife's person. Whether that occurs is beside the point.

Id.

It certainly is not beside the point. As repeatedly explained by courts, burglary law is designed to protect the dweller and his/her right of habitation. The issue of violence is obviously an element that threatens a spouse's status as a dweller and most certainly affects his/her habitation. Aggravated burglary statutes, by their very definition, often are enacted to heighten the punishment for burglaries committed while an individual is armed or when the perpetrator has injured or threatened to injure a person in the dwelling. *See generally* WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., CRIMINAL LAW 800 (2d ed. 1986) (describing aggravated burglary and the manner in which legislatures classify levels of burglary in order to address the seriousness of a particular offense); OHIO REV. CODE ANN. § 2911.11 (Anderson 2000) (delineating that an offense is elevated from "burglary" to "aggravated burglary" when "a person other than an accomplice of the offender is present," when "the offender inflicts, or attempts or threatens to inflict physical harm on another," or when "the offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.")

Justice England goes on to state:

> Second, this case does not involve spouses who are divorced, legally separated, or already in court in a pending dissolution proceeding. The husband and wife here are married, and there is no objective, legal manifestation that their marriage or interpersonal relations are being unwound. That they live apart, it will be seen, is quite irrelevant to the legal issued posed.

Cladd, 398 So.2d at 445. This simply does not comport with the facts of the case. To most reasonable people, the fact that an estranged husband arrives at his wife's apartment, enters by breaking the lock with a crowbar, strikes his wife and attempts to throw her over a two story railing would present an "objective, legal manifestation that their marriage or interpersonal relations" are unwinding. That the spouses have not *legally* separated is, or should be, irrelevant.

Justice England continues:

> Third, this case does not entail a situation where separately-owned property, purchased or inherited by the wife, was established as a residence apart from her husband's. The record here only shows that Mrs. Cladd's living accommodations were separate from her husband's. We do not know who purchased the furnishings and fixtures, whether they came from a residence which had been occupied jointly, or even whether the separate abode was a second or alternative home.

*Id.*The record does, in fact, reveal that the defendant had "no ownership or possessory interest in his wife's apartment" and that he had never lived at the residence. Regardless of who purchased the furnishings, it is apparent that entry via crowbar is not an appropriate manner in which to retrieve them, and there is no evidence that Mr. Cladd's arrival at his wife's apartment centered around anything other than an intent to harm her once inside.

The dissent continues:

> When these matters are removed from the legal considerations, this case boils down to a husband's uninvited entry onto premises which the wife occupies away from the marital home. This situation is legally indistinguishable from other situations in which

Indiana

The erosion of the common law rule that husbands and wives could not commit crimes against each other's property continued in Indiana when, in 1982, the Court of Appeals of Indiana for the First District reversed a trial court decision to dismiss burglary charges against a wife for the burglary of her husband's tavern.[197] Bruce and

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a separate residence by one or both spouses and in which one is temporarily residing, such as a summer home, a winter ski lodge, a vacation cottage at the seashore, a temporary, rented haven from marital incompatibility, a remote wing or separate building on jointly occupied property (such as a studio garage in which one spouse works alone), or even a separate bedroom in which one spouse may be seeking a retreat in the marital home. The record of this proceeding nowhere indicates that the wife had a separate possessory interest in the property she placed in her separate facility. We do not know whether the six-month separation of these spouses was the result of estrangement, a mutually agreed-upon cooling off period, a segregated vacation plan, or some other reason. Mr. Cladd here, I submit, was simply charged with illegal entry into a place where his wife claimed sanctuary from their common residence. The manner of entry and the purpose for entry may prompt judicial concerns for the wife's welfare, but the parties' motives or state of mind will prove an unreliable touchstone for criminal prosecutions of this sort, I predict.

Id. at 445-46. Departing from the usual legal terminology for a moment, I would submit that this is utter hogwash. Detailed legal research uncovers scant, nay any, examples of spouses charged for burglary for attempting to gain access to the other spouse's "vacation cottage at the seashore." In the case at hand, Mr. Cladd was represented by the Public Defender; it appears unlikely that the court was dealing with a "segregated vacation plan." Finally, state of mind is essential to any burglary charge (note the requirement that the defendant must break and enter with the *intent* to commit an offense inside). It is no more an "unreliable touchstone for criminal prosecution" in marital cases than it is when the parties are unmarried.

Justice England concludes:

The effect of today's decision is to bring prosecuting attorneys into marital disputes in a way which is unprecedented in Florida or elsewhere. I confess I am not comfortable with the Third District's analysis of the basis for rejecting burglary prosecutions in these situations [based upon] a right of cohabitation or consortium. Those concepts connote marital harmony, and here we have obvious discord. I am quite comfortable, however, with the thought that our criminal courts should not be involved, in fact or as a threat, in domestic disputes which involve an invasion of one spouse's claim of separateness or privacy. Personal assaults, I repeat, are different, and in those cases perhaps different considerations should pertain.

Id. at 446. It trivializes the crime of spousal burglary to suggest that the only issue involved is "one spouse's claim of separateness or privacy." The reason the criminal courts should be involved is that all persons, married or unmarried, are entitled to the sanctity of their dwellings. When spouses are living apart and one spouse commits what, under any other set of circumstances, would constitute a burglary against the other, the criminal courts should step in and serve the functions of deterrence and punishment.

197. State v. Dively, 431 N.E.2d 540 (Ind. Ct. App. 1982). Marion Sue Dively was also known as Marion Sue Hembd. She moved to dismiss the burglary charge on the following grounds:

Because, upon divorce, . . . the court can divide marital property, it cannot really be known which spouse owns the property before a final decree; a wife has an unrestricted right to enter her husband's real estate, and therefore cannot be guilty of

Marion Hembd were separated and awaiting the final dissolution of their marriage when Mrs. Hembd entered a tavern owned by her husband despite being forbidden to do so.[198] Once inside, she stole $4,400.00 from a safe along with several bottles of whiskey.[199]

The Indiana appellate court framed the issue as "whether there exists in Indiana an interspousal immunity from criminal prosecution for [burglary] merely because of the marital status."[200] In deciding that there was no such immunity, the court embarked upon a discussion of the "unity doctrine" at common law, the effect of Married Women's Acts upon that doctrine, and recent developments under Indiana law.[201] The court noted that "[t]he Supreme Court of Indiana, early on, made inroads into the unity doctrine" when it "affirmed the conviction of a husband for arson of his wife's property while they were living together."[202] That case, as well as *Beasley v. State*[203] in which the supreme court held that a husband could be convicted for larceny of his wife's goods even while the two were living together, "had the effect of drastically altering the unity theory and interspousal immunity for crimes existing at common law."[204]

Labeling a 1972 case in which the Indiana Supreme Court struck down interspousal immunity in tort "a more recent blow to the unity theory," the court of appeals observed, "[t]he [supreme] court

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burglary of her husband's property; the Married Women's Act was never intended to create criminal liability between spouses; and the right of privacy precludes prosecution of one spouse for a crime against the property of another spouse. *Dively*, 431 N.E.2d at 542.

198. *Id.* at 541.

199. *Id.*

200. *Id.*

201. *Id.* at 541-42. The "unity doctrine" holds that "the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover she performs everything." IAN F.G. BAXTER, MARITAL PROPERTY 3 (1973) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *442). Consider the following passage critiquing the doctrine:

> The law of husband and wife thus bound the interests of spouses closely together. Ideally the system should have worked. If men always acted wisely and fairly, the common law rules on marital relations might have served everyone well enough. To say that they did not is only to state the obvious. Unity of person was based upon the perfect marriage, and therefore it inevitably created hardships in marriages that were less than ideal. MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 15 (1986).

202. *Dively*, 431 N.E.2d at 541. The court was referring to an 1866 decision in the case of *Garret v. State*, 10 N.E. 570 (Ind. 1866).

203. 38 N.E. 35 (Ind. 1894).

204. *Dively*, 431 N.E.2d at 542.

faced the argument that tort actions would tend to disrupt the peace and harmony of the marriage. Referring to the immunity doctrine as a 'legal fiction,' the court noted that the 'persuasiveness of the common law doctrine of unity between husband and wife has dwindled considerably.' "[205] In reinstating the burglary charges, the court of appeals announced it was "equally unimpressed that the criminal law should not intrude into the lives of married people where property rights are concerned."[206] The court concluded:

> [T]he mere fact of conjugal status does not preclude a spouse as a matter of law from committing an offense, including burglary, against the separate property of his or her spouse. We do not believe that the mere existence of the marriage relationship puts a spouse's separate property beyond the protection of the law and subject to the depredation of the other spouse.[207]

The decisions of the Indiana courts reflect an understanding of the archaic nature and inapplicability of the common law doctrines of unity and interspousal immunity to many crimes between spouses. While there is a growing trend toward this manner of judicial interpretation, it is not uniformly adopted throughout the country. In addition, in some jurisdictions, such as Ohio, statutes exist that open the door to defenses related to the unity doctrine, the idea that courts should not interfere in domestic disputes, and arguments regarding interspousal immunity.

Kentucky

Regrettably, one reason for the frequent appeals from spousal burglary convictions is their connection to death penalty sentences. In many states, burglary or aggravated burglary is listed as one of the criteria that may be considered in deciding between a sentence of life imprisonment and the imposition of the death penalty.[208]

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205. *Id.* The supreme court case involved was *Brooks v. Robinson*, 284 N.E.2d 794 (Ind. 1972), and in the decision, the court also remarked that current state law allowed actions of ejectment, contract enforcement, and actions in partition between spouses. *Id.*

206. *Id.* at 543. Additionally, the court pointed out that the definitional sections of the Indiana criminal code do not exclude spouses as victims. *Id.*

207. *Id.* The court acknowledged that circumstances such as "express or implied permission" may prevent a charge of burglary in certain cases; however, such circumstances were not at issue in the case. *Id.*

208. For example, Section 2929.04 of the Ohio Revised Code outlines the "Criteria for imposing death or imprisonment for a capital offense" as follows:

Imposition of the death penalty for aggravated murder is precluded unless one or

Such was the case in Kentucky, when, in 1985, the state supreme court considered the appeal of David Matthews of his death sentence for the murders of his wife and his mother-in-law, and his appeal of his twenty year prison sentence for the first-degree burglary of his wife's home.[209]

Mr. Matthews and his wife, Marlene, were married for approximately two and one-half years with the last year being particularly volatile.[210] Marlene obtained several warrants against her husband for harassment; when the parties separated, David lived with his mother.[211] Five weeks before she was murdered, Marlene sought and obtained two warrants against her husband – the first charging him with sexually abusing his six-year-old stepdaughter and the second charging him with burglarizing her home.[212]

At approximately 1:00 a.m. on June 29, 1981, David Matthews slit the side screen door to the house where his wife was living with her daughter, broke the window, and proceeded to the bedroom where his mother-in-law was sleeping.[213] He shot her at point blank range in the head, mortally wounded her.[214] Mr. Matthews told his psychiatrist that he then proceeded to his wife's room, had sexual relations with her, and, at approximately 6:00 a.m., shot her twice and killed her.[215] Among his thirty-seven assignments of error, he contended that:

> [H]e was entitled to a directed verdict on the burglary charge because he had formerly shared occupancy of the premises.

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more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt: . . . . The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

OHIO REV. CODE ANN. § 2929.04 (Anderson 2000).

209. Matthews v. Commonwealth, 709 S.W.2d 414 (Ky. 1985).

210. *Matthews*, 709 S.W.2d at 417.

211. *Id.*

212. *Id.* Although the sexual abuse order was served and prohibited Matthews from having contact with his wife, the burglary order was not served prior to the murders. *Id.*

213. *Id.* The home was rented from Mrs. Matthews's family and served, intermittently, as the marital residence for David and Marlene Matthews.

214. *Id.* The victim's husband and Marlene's father, Mr. Lawrence Cruse, found her the next morning still alive, however, she died from her wounds shortly thereafter. *Id.*

215. *Matthews*, 709 S.W.2d at 417. According to his psychiatrist, he shot her twice because "he thought he had missed the first time." *Id.*

> His position [was] that the house was first rented as an abode for him and his wife, that he had occupied it with her during their marriage except for the periods when they were estranged, and that, therefore, he had a legal right to be on the premises, regardless of proof that on the night in question he forcibly broke into the house against the occupant's wishes.[216]

The Kentucky Supreme Court flatly disagreed and stated, "[w]e reject the position that there is any absolute right on the part of one spouse to be with the other against the other's wishes, giving a right to break into the home of the other with the intent to commit a crime."[217] The court adopted the rationale of Florida, Ohio, and Washington courts that "burglary is an invasion of the possessory property right of another and extends to a spouse."[218] The court upheld the convictions for the murders of Marlene and her mother and for the burglary of Marlene's home, and ruled that the sentence of death was appropriate.[219]

Maryland

Maryland joined the growing number of states rejecting the notion that the marital relationship insulates one spouse from being charged with the burglary of the other spouse's residence when, in 1989, it upheld the burglary conviction of Charles Parham.[220] Parham and his wife, Charlene Queen, moved into a condominium in Baltimore shortly after marrying in 1987.[221] Their relationship, even at that time, was fraught with violence and Queen warned her husband that, if he continued to beat her, she would "put him out" of the house.[222] The beatings continued and within several months,

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216. *Id.* at 419.

217. *Id.* at 420. The court dismissed David Matthews's claims that he possessed a legal right to be at the home by remarking that the home "was owned by the victim's brother and rented to her, to be used as a marital abode when the parties were not separated." *Id.* Further, the court stated that David Matthews "was under a court order issued in connection with the sexual abuse charge . . . to stay away from the premises." *Id.*

218. *Id.* The court specifically referred to *Cladd v. State*, 398 So.2d 442 (Fla. 1981); *State v. Herrin*, 453 N.E.2d 1104 (Ohio Ct. App. 1982); and *State v. Schneider*, 673 P.2d 200 (Wash. Ct. App. 1983) and quoted *Cladd* with approval, "Where premises are in the sole possession of the wife, the husband can be guilty of burglary if he makes a nonconsensual entry into her premises with intent to commit an offense." *Matthews*, 709 S.W.2d at 420. (quoting *Cladd*, 398 So.2d at 444).

219. *Matthews*, 709 S.W.2d at 420, 424.

220. Parham v. State, 556 A.2d 280 (Md. Ct. Spec. App. 1989).

221. *Parham*, 556 A.2d at 281.

222. *Id.*

she made him leave the home.[223]

On December 16, 1987, Charles Parham returned to the home, threw a brick through the window, and hid in the home until his wife returned.[224] Upon her return, he attacked her, held a knife to her throat, and demanded that she remove her clothing and "run a hot tub of water" so that he could "cut [her] in pieces and put [her] in water."[225] He then stabbed her in the head and, later as she tried to escape, stabbed her again in the back.[226] She was eventually rescued by neighbors and taken to the hospital.[227]

On appeal, Parham contended that there was insufficient evidence to support his burglary conviction; specifically, he claimed that the state failed to establish that the "breaking" element of the burglary was into "a dwelling house of another."[228] Parham argued that:

> [A]s long as he and Queen remained married, the dwelling place is still marital property and thus, he has an absolute right to be there. [Parham] avers that, even though they separated on numerous occasions, the October separation was not final since some of his clothes were still in the condominium. Accordingly, he could not be convicted for burglary since his breaking and entering was not the dwelling place of another, but his own.[229]

The appellate court disagreed and pointed out that "the law of burglary was designed for the purpose of protecting the habitation" and that "occupancy or possession, rather than ownership, is the test."[230] The court noted that:

> Queen was in sole possession and in the process of purchasing the property in her own name, and . . . appellant was living with his sister and was not on the title. [Parham] had separated from his wife approximately six weeks prior to the incident, having spent only a week in the . . . home before the separation. He had left very few belongings there; most of his clothes were at other places . . . . Also indicative of

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223. *Id.*
224. *Id.* at 284.
225. *Id.* at 282.
226. *Parham*, 556 A.2d at 282.
227. *Id.* at 282.
228. *Id.* at 284.
229. *Id.*
230. *Id.* at 284 (citations omitted).

> appellant's lack of a possessory or occupancy interest is the method he used to gain entry. Appellant threw a brick through a window, unlocked it and entered with the intent to assault his wife. This method of entry is inconsistent with any kind of permissive entry. Moreover, his wife had "put him out" of the home.[231]

As this was a case of first impression in Maryland, the court relied on holdings from other jurisdictions, including, Florida, Kentucky, Virginia, Indiana, Louisiana, North Carolina, Washington, and Ohio and observed that "other courts have held, virtually unanimously, that the marital relationship does not preclude a conviction for burglary."[232] The court ruled that the evidence against Charles Parham was sufficient to affirm his burglary conviction.[233]

North Carolina

In 1985, the Court of Appeals of North Carolina grappled with the issue of whether a "marital relationship, in and of itself, constitute[d] a complete defense to the offense of burglary in the first degree" when it considered the case of *State v. Cox*.[234] Saunders Cox rented a house with his wife and daughter until July 1982 when he and his wife separated.[235] He moved out of the house but continued to visit his daughter and provided financial support to both his wife and his daughter.[236] Nearly one year after Mr. Cox

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231. *Parham*, 556 A.2d at 284 n.3.

232. *Id.* at 284-85. The court reviewed the cases of *Cladd v. State*, 398 So.2d 442 (Fla. 1981) (noting that it expressly overruled *Vazquez v. State*, 350 So.2d 1094 (Fla. Dist. Ct. App. 1977)); *Matthews v. Commonwealth*, 709 S.W.2d 414 (Ky. 1985); *Knox v. Commonwealth*, 304 S.E.2d 4 (Va. 1983); *State v. Dively*, 431 N.E.2d 540 (Ind. Ct. App. 1982); *State v. Woods*, 526 So.2d 443 (La. Ct. App. 1988); *State v. Cox*, 326 S.E.2d 100 (N.C. Ct. App. 1985); and *State v. Schneider*, 673 P.2d 200 (Wash. Ct. App. 1983). The court cited only *State v. Weitzel*, 168 N.E.2d 550 (Ohio Ct. App. 1960) as contrary to the former holdings but noted that *State v. Herrin*, 453 N.E.2d 1104 (Ohio Ct. App. 1982) seemed to contradict *Weitzel*. *Parham*, 556 A.2d at 284-85.

233. *Parham*, 556 A.2d at 284-85. The final footnote in the case observes that such a holding comports with the section of the Maryland Code that addresses defenses to the crime of theft. *Id.* The pertinent section reads, "(c) It is a defense to the offense of theft that . . . (3) [t]he property involved was that of the defendant's spouse, unless the defendant and the defendant's spouse were not living together as man and wife and were living in separate abodes at the time of the alleged theft." *Id.* (referring to MD. ANN. CODE, § 343 (1957, 1987 Repl. Vol.).

234. 326 S.E.2d 100, 102 (N.C. Ct. App. 1985).

235. *Cox*, 326 S.E.2d at 102. The court noted that "Mrs. Cox intended the separation to be permanent." *Id.*

236. *Id.*

moved out of the house, he called and asked his wife if he could come to the house, but his wife refused.[237] When he asked if, instead, he could speak to his daughter, his wife told him that she was spending the night with a relative.[238] Shortly thereafter, he arrived at the home and demanded that she unlock the door and allow him to come inside the residence.[239] When she refused and called the police, he slashed the tires on the car of the man who was inside the home with his wife, kicked in the door of the house, and proceeded to his daughter's bedroom where he found the man and stabbed him in the leg.[240] Upon witnessing this, Mrs. Cox shot her husband but did not kill him.[241]

At trial, a jury convicted Mr. Cox of assault with a deadly weapon inflicting serious injury and first degree burglary.[242] He was sentenced to five years in prison for the assault and twenty-five years in prison for the burglary.[243] Upon appeal, he argued that "the evidence clearly shows that . . . [he] was entitled to enter his marital domicile even though he had been separated from his wife."[244] While conceding that the State bore the burden of proving that Mr. Cox "wrongfully entered" the dwelling house "of another," the appellate court found that the following facts met that burden:

> [T]he State offered evidence tending to show that Mrs. Cox occupied the residence located at 1204 W. Fifth Street. Defendant's wife paid the rent and utilities pursuant to her occupation of the house. Mrs. Cox testified that defendant had not resided in the home for more than a year prior to the offense with which he was charged, and that she repeatedly refused to admit him on the night in question. We think this evidence ample to permit an inference that defendant broke and entered the dwelling house of another.[245]

The court rejected "defendant's argument that the marital relationship between him and Mrs. Cox necessarily created in the defendant a property interest in the residence of Mrs. Cox."[246]

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237. *Id.*
238. *Id.*
239. *Id.*
240. *Cox*, 326 S.E.2d at 102.
241. *Id.*
242. *Id.* at 101.
243. *Id.*
244. *Id.* at 102.
245. *Cox*, 326 S.E.2d at 103.
246. *Id.*

Addressing the defendant's claim that the trial court improperly excluded evidence showing that elements of his personal effects remained in the home, the court declared that "neither the absence of a separation agreement nor the presence of his clothing and tools in the house is relevant to defendant's right to enter the home occupied exclusively by Mrs. Cox and the couple's daughter."[247] Finally, the court rejected Mr. Cox's assertions that the trial court should have instructed the jury that self-defense was a possible defense when the "person assaulted is without fault and on his own premises."[248]

Texas

In 1982, the Court of Criminal Appeals of Texas had little difficulty affirming the conviction of Frank Stanley for the burglary of an apartment inhabited by his wife and her ten-year-old son.[249] The couple was married for slightly more than one year before Carolyn Stanley filed for divorce and requested a temporary restraining order against her husband.[250] When her husband failed to appear at a hearing to show cause why such an order should not be granted, the court granted the order; however, there was no record showing that the order was ever served upon Mr. Stanley.[251]

Shortly thereafter, Mrs. Stanley and her son moved to an apartment near the facility at which she would be working.[252] Three days later, her husband shot his way through a sliding glass door and threatened to kill both of them.[253] She and her son tried to take refuge in the bathroom, but he shot the locks off of that door as well; Mrs. Stanley finally emerged from the bathroom after Mr. Stanley promised that he would not kill her son.[254] A physical altercation occurred after Mr. Stanley announced that he was going

247. *Id.*

248. *Id.* The court also rejected Mr. Cox's contention that "the court should have instructed, even absent request, 'that the defendant's evidence as to this right to enter the dwelling house, if accepted by the jury, would constitute a defense to the charge of first degree burglary.' " *Id.* The court flatly stated, "We find both contentions unpersuasive because no evidence was presented that tended to show that defendant was 'on his own premises' when he stabbed Mr. Withers [the victim's houseguest], or that tended to show that defendant had a 'right to enter the dwelling house.' " *Id.*

249. Stanley v. State, 631 S.W.2d 751 (Tex. Crim. App. 1982).

250. *Stanley*, 631 S.W.2d at 752.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

to kill himself and his wife; during the struggle, Mrs. Stanley was shot in the thumb.[255]

Frank Stanley did not dispute any of the facts regarding the separation, the impending divorce, the separate residence, his breaking and entering of the apartment, the fact that he planned to kill his wife once inside, or the fact that he knew his wife did not consent to his entry.[256] Instead, he argued that because "he was married to the person that occupied the premises he entered and since he had not been notified of the temporary injunction prohibiting the same, he had the right to enter into and dwell in the same habitation as his spouse and to enjoy his conjugal rights."[257] The court summarily dismissed this defense and stated that Carolyn Stanley "clearly had the greater right of possession and was an 'owner.' "[258] In rejecting Mr. Stanley's contention that the trial court erroneously refused to instruct the jury on his version of "effective consent,"[259] the court remarked that Mrs. Stanley "had the right to refuse consent" and that there was "no implied consent to break and enter merely because of the marital status."[260]

The Court of Appeals of Texas for the Eighth District found the *Stanley v. State* logic equally applicable to the offense of criminal trespass when it reviewed the conviction of Bobby Pat Davis in

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255. *Stanley*, 631 S.W.2d at 752.

256. *Id.* at 752-53.

257. *Id.* at 753. The appellate court summarized his argument as follows:

> What he does argue is that one of the elements of the offense of burglary of a habitation with intent to commit murder is that entry be made without the effective consent of the owner . . . and that "owner" is defined as "a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor." . . . Apparently appellant would argue that his wife could not qualify as an "owner" under the statutory definition having no greater right of possession than he, and even if she was an "owner" there was implied consent because of the marital status.

Id. (citations omitted).

258. *Id.*

259. *Id.* The appellant requested the following charge to the jury:

> Effective consent means consent in fact, whether express or apparent, and includes consent by a married person legally authorized to act for the owner. However, a married person has the implied effective consent to enter upon or into the habitation of the other spouse. To establish lack of effective consent in regard to a spouse entering into the habitation of the other spouse, there must also be shown that there was a lawful court order prohibiting such spouse from entering into the habitation of the other spouse, and, that the spouse to whom the court order is directed, had specific notice of the existence of such order.

Id. Stanley, however, provided no support for such a charge, and the appellate court affirmed the trial court's refusal to give such a charge. *Id.*.

260. *Stanley*, 631 S.W.2d at 753.

1990.[261] The facts surrounding Davis's marital relationship were similar to those in *Stanley*; that is, Davis and his wife separated, his wife left the home they had shared, and rented an apartment in her own name.[262] While the first rental payment for the apartment came from a joint account, subsequent payments were made from an account Mrs. Davis opened after the separation.[263] She did file for divorce and, in this case, no restraining or protective order was requested.[264] Mrs. Davis, however, did refuse to speak to her husband on the telephone and instructed him never to enter her apartment.[265]

Mr. Davis went to the school where his wife worked and took, without her permission, a key to her apartment that she kept in her car.[266] He waited until she was out of town and entered her apartment "seeking evidence of his wife's cohabitation with a boyfriend."[267] When neighbors noticed his suspicious activity, they called the police, who subsequently found him hiding in a closet.[268] He was found guilty of criminal trespass and sentence to six months probation and a $200.00 fine.[269]

The Texas Penal Code provided that an individual is guilty of criminal trespass if he "enters or remains on property or in a building of another without effective consent and he: (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so."[270] The Code further stated that "notice" is defined as "oral or written communication by the owner or someone with apparent authority to act for the owner."[271] Davis argued on appeal that he could not be convicted of this crime because Texas was a community property state and, as such, *he* was the owner of the property.[272]

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261. Davis v. Texas, 799 S.W.2d 398 (Tex. App. 1990).

262. *Davis*, 799 S.W.2d at 399.

263. *Id.*

264. *Id.*

265. *Id.* at 399-400. In fact, he acknowledged at trial that he knew "she didn't want me around at all and she told me not to go around the apartment." *Id.* at 400.

266. *Id.* at 399.

267. *Davis*, 799 S.W.2d at 399. Moreover, he parked a distance from the apartment so as not to attract attention from his wife's neighbors. *Id.* at 400.

268. *Id.* at 399.

269. *Id.*

270. *Id.* at 400 (citing TEX. PENAL CODE ANN. § 30.05 (West 1989)).

271. *Id.* (citing TEX. PENAL CODE ANN. § 30.05 (West 1989)).

272. *Davis*, 799 S.W.2d at 400 (explaining that Texas Penal Code Ann. Section 1.07(a)(24) (West 1974) defined "owner" as "[A] person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor.").

Relying on the decision in *Stanley*, the court of appeals rejected this point of error and remarked:

> We find that under the circumstances of the present case, the complainant was an owner and, as having a greater right to possession of the premises, had the right to refuse entry to the Appellant. The record is clear that the complainant had not wanted to communicate with the Appellant after she had established herself in the new residence. The prior understandings during the first estrangement coupled with the Appellant's surreptitious actions surrounding his entry and discovery in the apartment are circumstances militating against the Appellant's assertions.[273]

The *Davis* court, much like the *Stanley* court, rejected arguments that because the property within Mrs. Davis's apartment consisted of joint community property, it was legally impossible for Mr. Davis to trespass.[274] While the appellant wanted the court to focus on the fact that in *Stanley* there was a temporary restraining order against the defendant and in his case there was not, the court pointed out that the *Stanley* court "put aside the question of the temporary injunction and chose to dwell upon the circumstances which established the wife's ownership status."[275] Consequently, the *Davis* court focused on the circumstances surrounding the trespass and the fact that the appellant conceded that he was "seeking evidence against his wife" and found that such circumstances outweighed contentions that Mr. Davis was entitled to enter the apartment because some of his property was inside.[276] Consequently, Bobby Pat Davis's conviction for criminal trespass was affirmed.[277]

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273. *Id.*

274. *Id* at 400-01.

275. *Id.* at 401.

276. *Id.* The court also rejected Davis's assertion that the denial of his motion for a directed verdict violated his due process rights under the Texas and United States Constitutions. *Id.* Davis attempted to argue that "certain provisions of the Family Code and the Penal Code concerning temporary restraining orders and protective orders must be complied with in order to provide due process to a spouse who enters an estranged spouse's residence." *Id.* Heavy reliance on *Stanley* continued as the court noted, "[that] case does not support Appellant's contentions that various aspects of marital property law must be adhered to prior to a prosecution under the Penal Code." *Id.* Likewise, the court rejected an assertion that an interpretation of the criminal trespass statute that permitted spousal liability "amounted to an ex post facto law" by observing that "the present statute contains explicit language concerning the giving of notice and . . . the Appellant received such notice that he was not to enter the apartment." *Id.* at 402.

277. *Davis*, 799 S.W.2d at 402.

Virginia

A final review of a state's handling of the issue of spousal burglary can be found in the Virginia case of *Knox v. Commonwealth*.[278] In this case, Billy Joe and Shirley Knox separated after Billy Joe physically abused Shirley.[279] She subsequently moved into an apartment with her children.[280] Approximately six months later, Billy Joe Knox "broke open Shirley's front door," walked to her bedroom, and physically assaulted his wife and her male friend.[281] He was subsequently sentenced to two years in prison under Virginia's burglary statute.[282]

Knox argued on appeal that the Commonwealth was required to show that his "right of access or consortium [had] been limited by Court Order or Decree" to convict him of burglary.[283] His basis for this argument was the common law right of consortium, and he asserted that, "absent . . . judicial restraint," this right serves as "a limitation on a spouse's dominion and control over premises owned and occupied by that spouse."[284] The court interpreted such an argument as follows: "In effect, Knox argues that a husband, although living apart from his wife, has a right, derived from his right of access to her society and conjugal relations, to break and enter her dwelling, even if he does so with intent to commit assault and battery upon her person."[285] In response, the court dryly announced, "If ever this was the law, and we think it never was, it is no longer."[286]

Rather than focusing on burglary law as support for its conclusion, the court relied on Virginia's Married Woman's Act as the basis for upholding Knox's conviction.[287] The court

278. 304 S.E.2d 4 (Va. 1983).

279. *Knox*, 304 S.E.2d at 5.

280. *Id.*

281. *Id.*

282. *Id.* (explaining that Section 18.2-92 of the Code of Virginia Annotated, entitled "Breaking and entering dwelling house with intent to commit assault or other misdemeanor," provides:

> If any person breaks and enters a dwelling house while said dwelling is occupied, either in the day or nighttime, with intent to commit assault or any other misdemeanor except trespass, he shall be guilty of a Class 6 felony; provided, however, that if such person was armed with a deadly weapon at the time of entry, he shall be guilty of a Class 2 felony.)

283. *Id.*

284. *Knox*, 304 S.E.2d. at 5.

285. *Id.*

286. *Id.*

287. *Id.* at 5-6. The portion of the statute that the court relied on reads: "A married

acknowledged that the Act had been interpreted to empower a woman to "enforce her [civil] possessory rights in real property," to sue her spouse for tortious damage to her property, to abolish the doctrine of interspousal immunity in wrongful death suits, and, finally, to permit a husband to be convicted for larceny of his wife's goods.[288] It took little expansion to hold that the Act created the basis for a burglary charge as the court concluded:

> Summarizing and applying the principles drawn from our decisions construing the Married Woman's Act, we are of opinion that when a wife is living apart from her husband in her own dwelling, one in which he has no proprietary interest, the husband's right of consortium is subordinate to the wife's right of exclusive possession; and, we hold that . . . a husband who breaks and enters his wife's dwelling with intent to commit assault is guilty of the crime of statutory burglary as defined in Code Section 18.9-92.[289]

Thus, Billy Jo Knox's conviction for burglary was affirmed.[290]

VI. Ohio's Opportunity for Improvement: A Statutory Amendment to Ohio Revised Code Section 3103.04

It is apparent that the law of spousal burglary has come virtually full circle from the days when it was legally impossible to commit such a crime against one's spouse. In light of the Supreme Court of Ohio's rulings in *Lilly* and *O'Neal*, one might wonder what else is necessary to provide spouses with the same protection in their homes that is enjoyed by unmarried individuals. I would submit the following: the Ohio Legislature should codify its holdings in *Lilly* and *O'Neal* through an amendment to Ohio Revised Code Section 3103.04 stating, "this section is inapplicable to criminal cases."

I offer two reasons for such an amendment. First, Ohio Revised Code Section 2901.04 provides, in pertinent part, that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the

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woman shall have the right to acquire, hold, use, control and dispose of property as if she were unmarried and . . . neither her husband's right to curtesy nor his marital rights shall entitle him to the possession or use . . . of such real estate during the coverture." *Id.* at 5 (citing Section 55-35 of the Code of Virginia Annotated and referring to the section as "a statutory descendant of a portion of the Married Woman's Act").

288. *Id.* at 5-6.

289. *Knox*, 304 S.E.2d at 6.

290. *Id.*

accused."[291] Notwithstanding arguments about the placement of the section among the domestic relations portions of the Code or the fact that its history can be traced to a civil law (the Ohio Married Women's Act), a plain reading of the statute gives absolutely no indication that one spouse's right to the other spouse's dwelling is vitiated in criminal law settings. The dissenting words of Justice Harlan in *Thompson v. Thompson*[292] actually present a very strong argument that Section 3103.04 *should* serve as a defense to a charge of burglarizing the dwelling of one's spouse. As support for his belief that if a statutory provision, "properly construed," leads to an unwanted result, the legislature, rather than a court, should amend the statute, Justice Harlan wrote:

> If the words used by Congress lead to such a result, and if, as suggested that result be undesirable on grounds of public policy, it is not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly-expressed will of the legislative department. With the mere policy, expediency or justice of legislation the courts in our system of government have no rightful concern. Their duty is only to declare what the law is, not what, in their judgment, it ought to be — leaving the responsibility for legislation where it exclusively belongs, that is, with the legislative department, so long as it keeps within constitutional limits.[293]

A thorough reading of Section 3103.04 of the Ohio Revised Code would, in no way, alert an individual that he did not possess the right to enter his spouse's dwelling. If there exists a presumption that all citizens are presumed to know what the law is, the holdings in *Lilly* and *O'Neal* are unfair to criminal defendants. The statutory amendment suggested would erase all doubt about the applicability of Section 3103.04 in criminal cases.

The second reason for the suggested amendment is grounded in both judicial efficiency and the necessity of discarding archaic and harmful theories about the marriage relationship. Quite frankly, it is shameful that, in the twenty-first century, arguments supporting a

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291. OHIO REV. CODE ANN. § 2901.04 (Anderson 2000).

292. 218 U.S. 611 (1910). In this case, the Supreme Court of the United States ruled that the common law unity, under which one spouse could not sue the other in tort because of the theory that they were one under the law, was not abrogated by the passage of the District of Columbia's version of a Married Women's Act. *Id.* at 619.

293. *Id.* at 621.

spouse's right to consortium or right to society are still being made in the context of explosive violence between married couples and that such arguments are given consideration at the highest levels of the judiciary.[294] And yet, they will continue to be made until the law is settled and unambiguous.

For example, *Lilly* focused on a burglary at a spouse's separately leased apartment and *O'Neal* involved a burglary at a home leased solely by the wife. Despite language in *Lilly* that "in Ohio, one can commit a trespass and burglary against property of which one is the legal owner if another has control or custody of that property," the only issue actually before the court was whether Ohio Revised Code Section 3103.04 "precludes prosecution of one spouse for burglary committed in the residence of the other spouse."[295] It is not at all difficult to imagine a defense argument that those holdings should be limited to the particular factual situations (i.e., separately leased dwellings) involved in *Lilly* and *O'Neal* and that neither applies to a situation in which one spouse enters a home to which he holds full or partial legal title and where he, for some amount of time, resided.[296]

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294. Consider the following excerpt from Catherine F. Klein and Leslye E. Orloff's article, *Providing Legal Protection for Battered Women: An Analysis of State Statute and Case Law*:

> Statutory protection of former, as well as current, spouses is a well-founded policy in light of the Justice Department's National Crime Survey, which revealed that seventy-five percent of all reported domestic abuse was reported by separated or divorced women. Violence is often triggered by the anger aroused by threatened loss and excessive feelings of dependency making the period during and after separation an extremely dangerous time. Women who are divorced or separated are at higher risk of assault than married women. The risk of assault is greatest when a woman leaves or threatens to leave an abusive relationship. Nonfatal violence often escalates once a battered woman attempts to end the relationship. Furthermore, studies in Philadelphia and Chicago revealed that twenty-five percent of women murdered by their male partners were separated or divorced from their assailants. Another twenty-nine percent of women were murdered during the separation or divorce process. State statutes need to protect women and children during and after the break-up of relationships because of their continuing, and often heightened, vulnerability to violence.

Catherine F. Klein and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statute and Case Law*, 21 HOFSTRA L. REV. 801, 815-16 (1993) (footnotes omitted).

295. *Lilly*, 717 N.E.2d at 327, 325.

296. Indeed, consider the following argument by defense counsel in the *Jones* case, described at the beginning of this comment, that involved a charge of aggravated burglary at the home formerly shared by the couple and in which the defendant retained a one-half legal interest:

> I'd like to address the cases [the prosecution] has referred to . . . if you look through those cases . . . they talk about *Lilly* . . . when you read [it], it talks about, and I'm quoting,

The statutory amendment proposed herein would prevent this and would allow any other such arguments to be disposed of well before trial. More importantly, the amendment would expand the protection from spousal burglary that the *Lilly* court so wisely created.

Jane M. Keenan

"This case presents the Court with the question of whether Revised Code 3103.04 precludes prosecution of one spouse for burglary committed in the residence of the other spouse." And in [*Lilly*] there was separately, *separately* leased property of one spouse. The same in *O'Neal* and that takes care of the . . . Supreme Court cases that they rely on. Transcript of Proceedings for February 11, 2000, at 66-67, *Jones* (No. 99-CR-120) (emphasis added).